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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1887.

No. 229.

ABIGAIL R. COLTON, APPELLANT,

vs.

ELLEN M. COLTON.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF CALIFORNIA.

FILED MAY 22, 1885.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, AUGUST 10, 1887.

1 *Bill of Complaint.*

In the Circuit Court of the United States in and for the District of California. In Equity.

ABIGAIL R. COLTON, Complainant,
vs.
ELLEN M. COLTON, Defendant.

To the honorable the judges of the circuit court of the United States in and for the district of California:

Abigail R. Colton, of the city of New York, in the State of New York, a citizen of said State, brings this bill against Ellen M. Colton, a citizen of the State of California, residing in San Francisco, in said State of California.

And thereupon your oratrix complains and says that on the 11th day of June, 1829, at Sangerville, in the State of Maine, she intermarried with Isaac W. Colton; that on or about the seventeenth day of July, 1831, there was born to her, the issue of the said marriage, a son, David D. Colton, and that on or about the 30th
2 day of January, 1844, there was born to her, also the issue of the said marriage, a daughter, Martha Colton.

And your oratrix further shows that her said husband, the said Isaac W. Colton, departed this life on or about the 18th day of November, 1875, at the city of New York, where he then resided.

And your oratrix further shows that on or about the first day of March, 1854, the said David D. Colton, the son of your oratrix, intermarried with defendant in this cause, and that the said David D. Colton departed this life at the city and county of San Francisco, in the State of California, on the ninth day of October, A. D. 1878.

And your oratrix further shows that on the eighth day of October, A. D. 1878, the said David D. Colton made and executed in due form his last will and testament, a copy of which is hereunto annexed and marked "Exhibit A," and your oratrix prays that the same may form and be taken as a part of this bill.

And your oratrix further shows that, as she is informed and believes, on or about the twenty-ninth day of October, A. D. 1878, the defendant duly filed the said last will and testament of the said David D. Colton in the then probate court in and for the city and county of San Francisco, State of California, and thereafter such proceedings were duly had in said probate court that on or
3 about the eleventh day of November, A. D. 1878, an order of said probate court was duly made and entered appointing the defendant executrix of the said last will and testament, and thereupon the defendant duly qualified as such executrix and letters testamentary upon the said last will and testament were duly granted and issued to her, the said defendant, and the said defendant thereupon entered upon and thereafter continued to discharge the duties as such executrix until about the eighteenth day of December, A. D. 1879, when, by an order or decree of said probate

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2 day of January, 1844, there was born to her, also the issue of the said marriage, a daughter, Martha Colton.

And your oratrix further shows that her said husband, the said Isaac W. Colton, departed this life on or about the 18th day of November, 1875, at the city of New York, where he then resided.

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And your oratrix further shows that on the eighth day of October, A. D. 1878, the said David D. Colton made and executed in due form his last will and testament, a copy of which is hereunto annexed and marked "Exhibit A," and your oratrix prays that the same may form and be taken as a part of this bill.

And your oratrix further shows that, as she is informed and believes, on or about the twenty-ninth day of October, A. D. 1878, the defendant duly filed the said last will and testament of the said David D. Colton in the then probate court in and for the city and county of San Francisco, State of California, and thereafter such proceedings were duly had in said probate court that on or
3 about the eleventh day of November, A. D. 1878, an order of said probate court was duly made and entered appointing the defendant executrix of the said last will and testament, and thereupon the defendant duly qualified as such executrix and letters testamentary upon the said last will and testament were duly granted and issued to her, the said defendant, and the said defendant thereupon entered upon and thereafter continued to discharge the duties as such executrix until about the eighteenth day of December, A. D. 1879, when, by an order or decree of said probate

court, then and there duly made and entered, the whole estate, real and personal, of the said David D. Colton then remaining was distributed to the said defendant and she was discharged from any further duties as such executrix.

And your oratrix further shows that the said estate of the said David D. Colton, so as aforesaid distributed to the defendant, was and is of great value, as your oratrix is informed and believes, of about one million dollars, and, as your oratrix is informed and believes, is growing and increasing in value.

And your oratrix further shows that the said defendant has, although often demanded, utterly failed, neglected, and re-
4 fused to make to or for your oratrix any gift or provision whatever from the estate of your oratrix' son, the said David D. Colton, except as hereinafter mentioned, that is to say: On or about March 1st, 1880, the defendant sent to your oratrix the sum of fifty dollars; and thereafter, at divers times, and at various intervals between the day last named and about the first day of January, 1881, the defendant sent to your oratrix about five other sums of fifty dollars each, amounting in the whole, as above given to your oratrix, to the sum of about three hundred dollars; and in or about the month of February, 1881, the defendant sent to your oratrix the further sum of six hundred dollars; and in or about November, 1882, she gave to your oratrix the further sum of six hundred dollars; the whole given as aforesaid, since the death of the said David D. Colton amounting altogether to the sum of about fifteen hundred dollars only.

And your oratrix further shows that on or about the 20th day of October, 1883, your oratrix made, signed, and caused to be served upon the defendant, at the said city and county of San Francisco, State of California, a demand that she execute the terms and directions of the last will and testament of the said David D. Colton, and that from his said estate, so as aforesaid distributed to the defend-
5 ant, she make a suitable provision for your oratrix, a copy of which said demand is annexed to this bill as "Exhibit B," and which said exhibit your oratrix prays may be taken to form a part of this bill.

But so it is, may it please your honors, that the defendant, notwithstanding the said demand, has failed, neglected, and refused, and still fails, neglects, and refuses, to make a suitable or any provision whatever for your oratrix.

Your oratrix further shows that she is now in the seventy-fifth year of her age, and that for many years prior to the death of her husband, the said Isaac W. Colton, she was in feeble health and ever since that event she has been an invalid and endured much sickness and suffering and has required much medical attendance and the almost constant nursing and care of her said daughter, Martha Colton, who has always resided with her, until the present time.

That your oratrix is not the owner of and has no interest in any real estate, or chattels real, except a one-half lot in Greenwood cemetery, near the city of New York, where her said husband is buried, and that besides her wearing apparel your oratrix has no

personal property whatever except the sum of $15,000, which
6 she has had loaned out upon interest ever since, on or about, March 1st, 1877, from which time, the possession and loaning out of the said sum of $15,000 by your oratrix were well known to the said David D. Colton, down to and at the time of his making his last will and testament.

And your oratrix further shows that her entire income ever since the death of her son, the said David D. Colton, has consisted solely of the interest moneys arising from the loan of the aforesaid fifteen thousand dollars, and the aforesaid several sums of money given by the defendant to your oratrix as aforesaid; and ever since in November, 1882, her income has consisted and does still consist solely of said interest moneys alone.

And your oratrix further shows, that at the time of the death of the said David D. Colton, his sister, the said Martha Colton, was not and is not now the owner of any real estate or property, nor has she any income whatever, and your oratrix has, therefore, ever since the death of the said Martha's father provided and still provides her, the said Martha, support and maintainance.

That by your reason of your oratrix' very limited income aforesaid, and notwithstanding great economy in her living and expenses and the denying herself much that would conduce to
7 her health and comfort, your oratrix is in very straightened circumstances.

To the end, therefore, that the said defendant may be compelled to execute the terms and directions of the said last will and testament of the said David D. Colton, and to make your oratrix a suitable provision from the said estate of the said David D. Colton in such amount and in such manner as to your honors shall seem seem meet and proper in the premises:

May it please your honors to grant unto your oratrix your writ of subpœna, directed to the said Ellen M. Colton, commanding her to appear and answer this bill of complaint, and to do and re-receive what by your honors shall seem meet.

ABIGAIL R. COLTON.
W. W. FOOTE,
Solicitor for Complainant.

W. W. FOOTE,
Of Counsel for Complainant.

8 STATE OF NEW YORK } ss:
City and County of New York, }

Abigail R. Colton, the complainant in the above-entitled bill, being duly sworn, doth depose and say that she has read the foregoing bill of complaint and knows the contents thereof, and that the same is true, except as to the matters which are therein stated on her information and belief, and as to those matters she believes it to be true.

ABIGAIL R. COLTON.

Sworn to before me this 20th day of November, 1883.

[NOTARIAL SEAL.]

H. P. ALLEN,
Notary Public, N. Y. C'y.

"EXHIBIT A."

I, David D. Colton, of San Francisco, make this my last will and testament. I declare that all of the estate of which I shall die possessed is community property and was acquired since my marriage with my wife. I give and bequeath to my said wife, Ellen M. Colton, all of the estate, real and personal, of which I shall die *siezed*, possessed, or entitled to. I recommend to her the care and protection of my mother and sister, and request her to make such gift and provision for them as in her judgment will be best. I also request my dear wife to make such provision for my daughter Helen, wife of Crittenden Thornton, and Carrie as she may in her love for them choose to exercise. I hereby appoint my said wife to be the executrix of this my last will and testament, and desire that no bonds be required of her for the performance of any of her duties as such executrix.

I authorize and empower her to sell, dispose, and convey any and of all of the estate of which I shall die *siezed* or possessed, without obtaining the order of the probate court or of any court, and upon such terms and in such manner, with or without notice, as to her shall seem best. If my said wife shall desire the assistance of any one in the settlement of my estate, I hereby appoint my friend S. M. Wilson, of San Francisco, and my secretary, Charles E. Green, of San Francisco, to be joined with her in the said executorship, and authorize her to call in either or both of the said gentlemen to be her co-executors; and in case she shall so unite either or both of them with her the same provisions are hereby made applicable to them as I have before made for her in reference to bonds and duties and powers.

San Francisco, October 8th, 1878.

DAVID D. COLTON.

Witness:

L. C. LANE,
652 *Mission St., San Francisco.*
RALPH C. HARRISON,
919 *Pine St., San Francisco.*

The above and foregoing instrument of two pages was on this 8th day of October, A. D. 1878, signed by the therein-named David D. Colton in our presence, and was by him at the time of signing the same declared to be his last will and testament, and thereupon, and after he had so signed and declared the same, we, in his presence and in the presence of each other and at his request, signed our name- thereto as witnesses.

San Francisco, October 8th, 1878.

L. C. LANE,
652 *Mission St., San Fracisco.*
RALPH C. HARRISON,
919 *Pine St., San Francisco.*

"EXHIBIT B."

NEW YORK, *September* 29, 1883.

To Mrs. Ellen M. Colton, San Francisco, Cal.:

By the last will and testament of my son, the late David D. Colton, and which said last will and testament bears date the 8th day of October, 1878, the legal title of all the estate, both real and personal, of which my said son died *siezed* or possessed, or entitled to, was vested in you for the uses and purposes in the said last will and testament expressed, and you were appointed executrix of said last will and testament.

In the said last will and testament are contained these words: "I recommend to her the care and protection of my mother and sister, and request her to make such gift and provision for them as in her judgment will be best."

My son, the said David D. Colton, died at the city and county
12 of San Francisco, in the State of California, on the 9th day of October, 1878.

On or about the 29th day of October, 1878, you duly filed the said last will and testament in the then probate court in and for the city and county of San Francisco, State of California, and thereafter such proceedings were duly had in said probate court that on or about the 11th day of November, 1878, an order of said court was duly made and entered appointing you executrix of said last will and testament, and thereupon you duly qualified as such executrix, and letters testamentary upon the said last will and testament were duly granted and issued to you, and thereupon you entered upon and thereafter you continued the discharge of your duties as such executrix until about the 18th day of December, 1879, when, by an order or decree of said probate court, then and there duly made and entered, the whole estate, real and personal, of the said David D. Colton, deceased, then remaining was distributed to you and you were discharged from any further duties as such executrix.

It is now over three years since the said estate came in your possession, yet you have utterly failed and neglected to make a
13 suitable or any provision for me, the mother of the said deceased.

I now therefore demand that you do forthwith execute the terms and directions of my said son's last will and testament, and that from his said estate you do make a suitable provision for me, his mother.

ABIGAIL R. COLTON.

[Endorsed:] Filed Dec'r 11, 1883. L. S. B. Sawyer, clerk, by F. D. Moncton, deputy clerk.

14 *Demurrer.*

In the Circuit Court of the United States in and for the Ninth Circuit and District of California.

ABIGAIL R. COLTON, Complainant,

vs.

ELLEN M. COLTON, Defendant.

The defendant, Ellen M. Colton, by protestation, not confessing all or any of the matters and things in the said complainant's bill contained to be true in such manner and form as the same are therein set forth and alleged, does demur to the said bill, and for cause of demurrer shows:

First. That the said complainant hath not by her said bill made such a case as entitles the said complainant to any relief in this court. Avouching any of the matters therein complained of, in this, that no estate, trust, or interest exists in favor of said complainant or arises in her favor out of the said last will and testament in her bill set forth or any matter, legacy, or devise therein contained.

Second. That this court hath no jurisdiction of the matters
15 and things set forth in said complainant's bill, nor hath it jurisdiction to consider the same or to grant the relief prayed for or any relief whatever.

Third. That neither this court nor any other court whatever hath jurisdiction to hear and determine the matters and things set forth in complainant's said bill or to grant the relief therein prayed or any other relief whatever.

Fourth. That it appears on the face of said complainant's bill that if any cause of action whatever exists by reason of the matters and things in said bill set forth that such cause of action is founded upon a stale equity and claim.

Fifth. That it appears on the face of complainant's said bill that the said cause of action therein set forth, if any such exists, accrued more than four years before the commencement of this action, and that the same is barred upon the principle which courts of equity follow in analogy to the statute of limitation at law.

Sixth. That it appears upon the face of said complainant's bill that the said pretended cause of action therein set forth accrued
16 more than four years before the filing of her said bill.

Seventh. That it appears on the face of complainant's said bill that the matters and things therein sought to be enquired of and determined have long since been enquired into and determined against the said complainant by the probate court of the city and county of San Francisco, State of California.

Wherefore, and for divers other good causes of demurrer appearing in the said bill, this defendant doth demur thereto, and prays the judgment of this honorable court whether she shall be compelled to make any further and other answer to the said bill; and she humbly prays to be dismissed from hence with her reasonable costs in this behalf sustained.

CRITTENDEN THORNTON,
Solicitor for Defendant, Ellen M. Colton.

I hereby certify that the foregoing demurrer is, in my opinion, well founded in point of law.

THOMAS P. STONEY,
Counsel for Defendant, Ellen M. Colton.
STANLEY, STONEY & HAYES, *Of Counsel.*

17 STATE OF CALIFORNIA, }
City and County of San Francisco, } *ss:*

Ellen M. Colton, the above-named defendant, being duly sworn, on her oath doth say that the foregoing demurrer is not interposed for delay.

—— ——.

Subscribed and sworn to before me this — day of June, 1884.

—— ——.

The affidavit of the defendant to this demurrer is hereby waived. June, 4 1884.

W. W. FOOTE,
For Compl't.

(Endorsed:) Service of a copy of the within demurrer is hereby admitted this 4th day of June, 1884. W. W. Foote, for compl't. Filed June 19, 1884. L. S. B. Sawyer, clerk, by F. D. Moncton, deputy clerk.

18 At a stated term, to wit, the July term, A. D. 1884, of the circuit court of the United States of America, of the ninth judicial circuit, in and for the district of California, held at the court-room, in the city and county of San Francisco, on Monday, the 22nd day of September, in the year of our Lord one thousand eight hundred and eighty-four.

Present: The Honorable Lorenzo Sawyer, circuit judge.

Order Sustaining Demurrer, &c.

MARTHA COLTON }
vs. } No. 3179.
ELLEN M. COLTON. }

This cause heretofore heard and submitted to the court for consideration and decision upon the demurrer herein having been duly considered, it is ordered that said demurrer be, and the same hereby is, sustained and the bill of complaint herein is dismissed.

It is further ordered that a decree be filed and entered herein accordingly.

19 *Endorsed.*

I hereby certify that the foregoing is a full, true, and correct copy of an original order made and entered in the above-entitled cause.

Attest my hand and the seal of said circuit court this 22 day of September, A. D. 1884.

[Seal Circuit Court.]

L. S. B. SAWYER, *Clerk*,
By F. D. MONCTON,
Deputy Clerk.

20 *Enrollment.*

United States Circuit Court, Ninth Circuit, District of California.

ABIGAIL R. COLTON, Complainant,
vs.
ELLEN M. COLTON, Respondent. } No. 3179.

The complainant filed her bill of complaint herein on the 11th day of December, 1883, which is hereto annexed.

On the 19th day of June, 1884, a demurrer was filed herein, which is hereto annexed.

On the 22d day of September, 1884, an order on said demurrer was made and entered herein, a certified copy of which order is hereto annexed.

On the same day, to wit, September 22d, 1884, a final decree was filed and entered herein in the words and figures following, to wit:

21 At a stated term, to wit, the July term, A. D. 1884, of the circuit court of the United States of America, of the ninth judicial circuit, in and for the district of California, held at the court-room, in the city and county of San Francisco, on Monday, the 22d day of September, in the year of our Lord one thousand eight hundred and eighty-four.

Present: The Honorable Lorenzo Sawyer, circuit judge.

Decree.

ABIGAIL R. COLTON
vs.
ELLEN M. COLTON. } No. 3179.

The court having sustained the demurrer of the respondent to the complainant's bill of complaint herein and ordered that said bill be dismissed at complainant's cost—

Thereupon, upon consideration thereof, it is ordered, adjudged, and decreed that the complainant's bill herein be, and the same hereby is, dismissed.

And it is further ordered that said complainant pay said respondent her costs in this behalf expended, to be taxed.

SAWYER,
Circuit Judge.

(Endorsed:) Filed and entered September 22, 1884. L. S. B. Sawyer, clerk.

22 *Clerk's Certificate.*

Whereupon said pleadings, certified copy of order, and final decreee are hereto annexed, said decree being duly signed, filed, and enrolled, pursuant to the practice of said circuit court.

[Seal Circuit Court.]

Attest, &c. L. S. B. SAWYER, *Clerk,*
By F. D. MONCTON,
Deputy Clerk.

(Endorsed:) Enrolled papers. Filed September 22, 1884. L. S. B. Sawyer, clerk, by F. D. Moncton, deputy clerk.

23 *Opinion.*

Circuit Court, District of California.

ABIGAIL R. COLTON *v.* ELLEN M. COLTON.

SEPTEMBER 22, 1884.

Will construed—Trusts—Recommendation and request.—The will of David D. Colton contains this provision: "I give and bequeath to my said wife, Ellen M. Colton, all my estate, real and personal, of which I shall die seized or possessed or entitled to. I recommend to her the care and protection of my mother and sister, and request her to make such gift and provision for them as in her judgment will be best." Held, That this provision is not an absolute gift or bequest in trust for the mother and sister of the testator; that it is not an imperative command to make the provision for their support, but only a recommendation and request, leaving the matter to the judgment and discretion of his surviving wife.

Trusts arising from precatory words in wills.—The conditions necessary to raise a trust from words of recommendation and request in a will discussed.

Rules for construction of wills under the civil code of California stated and applied.

The opinion states the facts.

W. W. & H. S. Foote and Grove L. Johnson, for the complainant; Crittenden Thornton and Stanley, Stoney & Hayes, for the defendant.

SAWYER, *Circuit Judge:*

This is a bill in equity to establish a trust in favor of complainant in the estate of the late David D. Colton, deceased, in the hands of his devisee and legatee, Ellen M. Colton, and to obtain a decree against the defendant, requiring her to make a suitable provision out of the estate devised and bequeathed to defendant for the maintenance of complainant.

The will out of which the suit arises is as follows, to wit: "I, David D. Colton, of San Francisco, make this my last will and

testament. I declare that all of the estate of which I shall die possessed is community property and was acquired since my marriage with my wife. I give and bequeath to my said wife, Ellen M. Colton, all of the estate, real and personal, of which I shall die seized or possessed or entitled to. I recommend to her the care and protection of my mother and sister and request her to make such gift and provision for them as in her judgment will be best. I also request my dear wife to make such provision for my daughter Helen, wife of Crittenden Thornton, and Carrie as she may in her love for them choose to exercise. I hereby appoint my said wife to be the executrix of this my last will and testament, and desire that no bonds be required of her for the performance of any of her duties as such executrix. I authorize and empower her to sell, dispose of, and convey any and all of the estate of which I shall die seized and possessed, without obtaining the order of the probate court, or of any court, and upon such terms and in such manner, with or without notice, as to her shall seem best. If my said wife shall desire the assistance of any one in the settlement of my estate I hereby appoint my friend, S. M. Wilson, of San Francisco, and my secretary, Charles E. Green, to be joined with her in the said executorship, and authorize her to call in either or both of the said gentlemen to be her co-executors; and in case she shall so unite either or both of them with her the same provisions are hereby made applicable to them as I have before made for her in reference to bonds and duties and powers."

The question is, Does this will create a trust in favor of complainant? Do the recommendations and requests found in the will give an absolute legacy to the complainant out of the estate, and do they constitute an imperative command to make the provision, or is the matter left to the discretion of the surviving wife, as sole devisee and legatee, to act in the matter as her judgment and feelings shall dictate? It cannot be denied that the earlier English decisions, and a few of the earlier cases in this country, go a long way toward sustaining the claim set up by the complainant. But later cases, both in England and the United States, considerably limit the construction given by the earlier decisions to precatory words of a will, or words of request or recommendation, and some of them, especially in this country, fall little short of repudiating and altogether overruling the earlier cases. Says Story, on this subject: "In the interpretation of the language of wills also courts of equity have gone great lengths by creating implied or constructive trusts from mere recommendatory and precatory words of the testator." 2 Story's Eq Jur., sec. 1068.

After considering the English cases, he adds: "The doctrine of thus construing expressions of recommendation, confidence, hope, wish, and desire into positive and peremptory commands is not a little difficult to be maintained upon sound principles of interpretation of the actual intention of the testator. It can scarcely be presumed that every testator should not clearly understand the difference between such expressions and words of positive direction and command; and that, in using the one and omitting the other, he

should not have a determinate end in view. It will be agreed on all sides that where the intention of the testator is to leave the whole subject, as a pure matter of discretion, to the good will and pleasure of the party enjoying his confidence and favor, and where his expressions of desire are intended as mere moral suggestions to excite and aid that discretion, but not absolutely to control or govern it, there the language cannot and ought not to be held to create a trust. Now, words of recommendation and other words precatory in their nature imply that very discretion, as contradistinguished from peremptory orders, and, therefore, ought to be so construed, unless a different sense is irresistibly forced upon them by the context. Accordingly, in more modern times a strong disposition has been indicated not to extend his doctrine of recommendatory trusts, but, as far as the authorities will allow, to give to the words of wills their natural and ordinary sense, unless it is clear that they are designed to be used in a peremptory sense." 2 Story Eq., sec. 1070.

The most favorable rule for complainant now recognized
24 that can be deduced from the body of the English authorities is, doubtless, that stated by Lord Langdale in Knight *v.* Knight, 3 Beav., 173, where he said: "As a general rule, it has been laid down that where property has been given absolutely to any person, and the same person *is*, by the giver, who has power to command, been recommended or entreated or wished to dispose of that property in favor of another, the recommendation, entreaty, or wish should be held to create a trust—1, if the words are so used that, upon the whole, they ought to be construed as imperative; 2, if the subject of the recommendation or wish be certain, and, 3, if the objects or persons intended to have the benefit of the recommendation or wish be also certain." See 44 Am. Dec., 372; note to Harrison *v.* Harrison's Adm'r, 2 Grat., 1. On the contrary, in the language of Story: "Wherever, therefore, the objects of the supposed recommendatory trusts are not certain or definite; wherever the property to which it is to attach is not certain or definite; wherever a clear discretion or choice to act or not to act is given; wherever the prior dispositions of the property import absolute and uncontrollable ownership; in all such cases courts of equity will not create a trust from words of this character." 2 Story's Eq. Jur., sec. 1070; see also Howard *v.* Carusi, 109 U. S., 733–'4, citing and recognizing the rule as stated by Story, and 2 Pomeroy's Eq. Jur., sec. 1014 to 1017, where the subject is well discussed.

Upon a careful consideration of the language of the will, giving the words their usual natural signification as they would, doubtless, be understood almost, if not quite, universally by ordinarily intelligent English speaking people, without reference to any strained, artificial, or technical rules of construction, it appears to me that two, at least, if not three of these requisite conditions negatively stated are found in the will. The "objects of the supposed recommendatory trusts" are, undoubtedly, "certain and definite;" they are the mother and sister of the testator. But "the property to which it (the trust) is to attach is not certain or definite." "The

subject of the recommendation or wish" is surely not "certain." No specific property or amount is indicated as the subject of the asserted legacy or trust. The testator only "requests" his general legatee and devisee "to make such gift and provision for them as in her judgment will be best," apparently leaving the whole matter to her judgment and discretion. How is the court to determine to what property or to what amount of money the trust is to attach? Neither the property nor the amount of money is indicated, and the testator has not left the matter to the judgment of the court to determine, but in express terms to the judgment of his surviving wife—his sole devisee and legatee. The subject is, therefore, not certain or definite. The testator has neither indicated the particular property nor the particular amount of money out of the million of dollars in value claimed to have been left to which the legacy of trust is to attach, nor has he indicated any rule by which the property or amount can be ascertained other than the judgment of his surviving wife, which judgment she appears to have exercised, for she made gifts from time to time in small sums, amounting in the aggregate to fifteen hundred dollars. Certainly the property or amount of money to which the trust, if any there be, is to attach—the subject of the recommendation or request or the subject of the trust—could not well be more uncertain or more indefinite. In the absence of words expressly creating a trust this indefiniteness and uncertainty constitute strong evidence that the testator did not intend to create a trust. In language quoted from 10 Ves., 536: "And wherever the subject to be administered as trust property and the objects for whose benefit it is to be administered are not to be found in the will not expressly creating a trust, the indefinite nature and *quantum* of the subject and the indefinite nature of the objects are always used by the court as evidence that the mind of the testator was not to create a trust, and the difficulty that would be imposed upon the court to say what should be so applied or to what objects has been the foundation of the argument that no trust was intended, or, as Lord Eldon expresses it in another case, Turn. & Russ., 159, 'where a trust is to be raised, characterized by uncertainty, the very difficulty of doing it is an argument which goes, to a certain extent, towards inducing the court to say it is not sufficiently clear what the testator intended.' See, also, Knight *v.* Boughton, 11 Clark & Finnel R., 548;" note to sec. 1070, Sto. Eq. Jur., p. 284–'5. In the notes to Harrison *v.* Harrison's Adm'x, 2 Grat., 1, reported in 44 Am. Dec., 375, and in 2 Sto. Eq. Jur., sec. 1073, *et seq.*, notes, the cases are cited illustrating certainty and uncertainty in a will, within the meaning of the condition of the rule adopted by the courts as to the subject of the recommendation or request, and, as it appears to me, few of those provisions held to be too uncertain to create a trust are more uncertain or indefinite than the provision in the will in question. And in the language of Lord Cottenham in Finden *v.* Stephens, 2 Phil., 142, "Words of recommendation are never construed as trusts unless the subject be certain." 44 Am. Dec., 376. The will in question, therefore, fails in this condition of certainty as to the subject

essential to the creation of a trust by precatory words, even under the English rule, most favorable to such trusts now recognized.

Again, under that branch of the rule stated by Story, that wherever "the prior dispositions of the property import absolute uncontrollable ownership, courts of equity will not create a trust from words of this character," 2 Sto. Eq. Jr., sec. 1070, this will is deficient in this one of the elements from which the intention to create a trust can be inferred. No language can more clearly and unmistakably "dispose of property" absolutely or "import absolute uncontrollable ownership" in the devisee or legatee than the language of this will making "the prior disposition of the property of the testator," which is, "I give and bequeath to my said wife, Ellen M. Colton, all of the estate, real and personal, of which I shall die seized or possessed or entitled to." And further on in his will, the testator adds: "I authorize and empower her to sell, dispose of, and convey any and all of the estate of which I shall die seized and possessed, without obtaining the order of the probate court or of any court, and upon such terms and in such manner, without or without notice, as to her shall seem best." If this language of gift and devise and this power to dispose of and control does not constitute "a prior disposition of the property," which "imports absolute and uncontrollable ownership," then I am at a loss to know what would express that idea or effect such a purpose. In this respect, also, the will is deficient in one of the elements suggested by Story as necessary to create a trust from mere precatory words or words of recommendation, or expressing a desire.

Again, are the words considered by themselves "so used as upon the whole they ought to be construed as imperative," or is there "a clear discretion or choice to act or not to act" given, irrespective of other elements to be considered. The language, and all the language, to be considered on this point is, "I recommend to her the care and protection of my mother and sister, and request her to make such gift and provision for them as in her judgment will be best;" or, in effect, I do not myself make any gift or any provision for them according to my judgment or determine how much they ought to have, but I recommend them "to her care and protection," and I "request her to make such gift and provision for them as in her judgment will be best."

By the express terms of the civil code of California "a will is to be construed according to the intention of the testator, and the "testator's intention is to be ascertained from the words of the will, taking into view the circumstances under which it is made, exclusive of his oral declarations." "All parts of the will are to be construed in relation to each other, and so as if possible to form a consistent whole." A clear and distinct devise or bequest cannot be affected * * * by any other words not equally clear and distinct, or by inference or argument * * * from other parts of the will." "The words of a will are to be taken in their ordinary and grammatical sense, unless a clear intention to use them in another sense can be collected and that other can be ascertained." Civil Code, sections 1317–'18, 1321–'2, 1324. It seems to me that under these rules it is impossible

to hold it to have been the intention of the testator himself to give absolutely any portion of his estate to be held in trust for complainant. The language is plain and readily understood, taking the words in their ordinary and grammatical sense. The testator manifestly appreciated the difference, which every one must recognize, between words of absolute devise or bequest and mere words of recommendation or request. To construe these latter words of recommendation and request as meaning precisely the same thing as words of absolute request would be to give them a meaning entirely different from the sense in which they are ordinarily used and ordinarily understood. The "clear and distinct" prior absolute "devise and bequest" to the defendant of all his estate, in language which it is impossible to misunderstand, would be materially "affected" by converting an indefinite and unascertainable part of the absolute estate given to defendant into a trust, by "words not equally clear and distinct," "by inference or argument from other parts of the will," contrary to the rule expressly laid down by the code. Had the testator intended to give any part of his estate absolutely in trust for the complainant he would certainly have so stated, and would have declared what part or how much money he intended to set apart for her. He would have made the extent of his bequest "clear and distinct"—as clear and distinct as the devise to the defendant—and not left it to the sole judgment of the defendant to determine the amount or character or value of the bequest or the extent of his bounty.

The language of the will cited seems to be plain and intelligible. It is not the language of gift or devise or the language of command. It is clearly language of recommendation and request, leaving the matter to the discretion and judgment of his surviving wife to carry out his suggestion or not, or to such extent as seems to her best, according to the dictates of her own discretion and judgment. Such is the plain import of the words as they would ordinarily be understood when taken by themselves and considered by the great mass of English-speaking people without reference to strained, artificial, or technical rules of construction. They are, as it seems to me, so plain to the common mind as not to need interpretation. But when we come to call in other elements recognized by the rules of construction heretofore adopted by the courts for the purpose of aiding in converting the recommendation and request into a command or gift we still find that all these elements except one—the certainty as to the objects—are wanting. The testator manifestly understood the force of language. He knew well what language to use to express his intention to make a divise or bequest. There is no uncertain sound in "I give and bequeath to my wife, Ellen M. Colton, all of the estate, real and personal, of which I shall die seized or possessed." If he had intended to make a gift, bequest, or devise to his mother and sister he certainly knew in what language to express that intent, and he would have said so, and how much. He has expressed, in specific language, no intention to give to them directly or to any one in trust for them any portion of his estate, or if any portion what particular portion or how much. He has simply used words of

recommendation and request to his sole devisee and legatee, and left the whole matter, in express terms, to her judgment. This is the plain natural meaning of his language when taken by itself or when considered in connection with all the other language of the will. When we consider the concise, clear, and specific language of this brief will, in all of its other parts, it seems impossible that the testator should have used words of mere recommendation and request to his wife, committing the whole matter as to the gift and
26 provisions for them, in express terms, to her judgment; that he should have requested her to make the gift when he intended to make a gift, legacy, or devise to them himself, when he intended to command.

It is urged on the part of the claimant that in this class of cases a wish expressed or a simple request to the devoted and obedient wife is equivalent to a command. This, when voluntarily recognized as an obligation by the wife in the affairs of married life, may be a very proper and salutary principle and practice in marital polity and domestic etiquette, but it is too romantic; too largely deficient in the sanctions of the obligations of positive law; too loose and uncertain to be adopted by the courts as a rule of law by which large estates are to be distributed in opposition to the plain, ordinary, actual matter-of-fact sense of the words of a will. As to myself I fully concur with Vice-Chancellor Hart, in his observations in Sale *v.* Moore, 1 Sim., 540, "That the first case that construed words of recommendation into a command made a will for the testator, for every one knows the distinction between them." He further adds that "the current authorities of late years *has* been against converting the legatee into a trustee." See 44 Am. Dec., 378, note. In my judgment, to hold that the precatory words and words of recommendation found in the will of the late General Colton creates an indefinite trust in an unascertained and uncertain *quantum* of the estate of the deceased in the hands of Mrs. Colton for the benefit of the mother and sister of the testator would be to make a will for the deceased, and not to execute the will made by him.

An argument is sought to be derived in favor of a construction creating a trust from the last two clauses in the will relating to co-executors. In case the executrix should desire assistance in the execution of the will the testator provisionally appoints two other gentlemen as exeutors, and authorizes the executrix to associate either one or both as co-executor or co-executors, "and in case she shall so unite either or both with her the same provisions are hereby made applicable to them, as I have before made for her, in reference to bonds and duties and powers." It is argued that under this provision the recommendation and request as to care and provision for the testator's mother and sister would impose the same trust on them as is imposed upon Mrs. Colton, and that certainly as to them the request is equivalent to a command, and being so as to them they must have the same construction with respect to Mrs. Colton; but the character of Mrs. Colton, as executrix and as devisee and legatee, are wholly different and distinct. These words of recommendation and request were addressed to her as the wife of the testator and his

devisee and legatee, and not as the executrix of his will, as owner and not administratrix of his estate. She has performed all her trusts as executrix; the estate has been settled and distributed to her as devisee and legatee, and she has been discharged from her trust as executrix. So it appears from the bill.

This suit is brought against her to enforce a trust vested in her as legatee for the benefit of the complainant and not against her in her representative character as executrix. So the closing passage of the will, making the same provision applicable to her co-executor or co-executors, in the contingency provided for, "as I have before made for her in reference to bonds and duties and powers," has sole reference to the bonds waived and to the "duties and powers" conferred on her as executrix. It confers no rights or powers or duties upon these co-executors in the character of devisees or legatees, and no argument can be derived from this passage to support the creation by the court of a trust.

Upon the views thus taken upon the construction of the will it is unnecessary to notice the other points argued under the demurrer. The demurrer is sustained, and, as the whole case depends upon the construction of the will, no amendment can be made to the bill that will obviate the objection taken by the demurrer. The bill must therefore be dismissed, and it is so ordered.

Endorsed: Read in open court September 22, 1884. L. S. B. Sawyer, clerk.

27 At a stated term, to wit, the July term, A. D. 1884, of the circuit court of the United States of America, of the ninth judicial circuit, in and for the district of California, held at the court-room, in the city and county of San Francisco, on Wednesday, the 29th day of October, in the year of our Lord one thousand eight hundred and eighty-four.

Present: The Honorable Lorenzo Sawyer, circuit judge; the Honorable George M. Sabin, U. S. district judge, of Nevada.

Order Allowing an Appeal.

ABIGAIL R. COLTON
vs.
ELLEN M. COLTON. } No. 3179.

On motion of W. W. Foote, Esq., of counsel for the complainant herein, it is ordered that an appeal from the decree filed and
28 entered herein on the 22d day of September, A. D. 1884, being a day in the July term, A. D. 1884, of said circuit court, to the Supreme Court of the United States be, and the same hereby is, allowed, and that a certified transcript of the pleadings, depositions, evidence, stipulations, and proceedings be forthwith transmitted to the Supreme Court of the United States upon the appellant giving a bond in the sum of five hundred dollars.

29 *Bond on Appeal.*

In the Supreme Court of the United States.

ABIGAIL R. COLTON, Appellant, *vs.* ELLEN M. COLTON, Appellee.

Know all men by these presents that we, F. A. Hassey and Holland Smith, are held and firmly bound unto Ellen M. Colton, the above-named appellee, in the sum of five hundred dollars, gold coin of the United States of America, to be paid to said Ellen M. Colton, her heirs, executors, or administrators; to which payment, well and truly to be made, we bind ourselves, and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents.

In witness whereof we have hereunto set our hands and
30 affixed our seals this 22d day of November, 1884.

The condition of this obligation is such that whereas the above-named Abigail R. Colton has taken an appeal to the Supreme Court of the United States to reverse the decree rendered by the circuit court of the United States of America, of the ninth judicial circuit, in and for the district of California, in the cause entitled Abigail R. Colton against Ellen M. Colton (No. 3179), which said decree was filed and entered of record in said circuit court on the twenty-second day of September, A. D. 1884:

Now, therefore, if the above-named Abigail R. Colton shall prosecute her said appeal to effect and answer all costs if she shall fail to make good her plea, then this obligation shall be void; otherwise to remain in full force and virtue.

F. A. HASSEY. [SEAL.]
HOLLAND SMITH. [SEAL.]

Signed, sealed, and delivered in presence of—
L. S. B. SAWYER.

31 UNITED STATES OF AMERICA, } *ss:*
District of California, }

F. A. Hassey and Holland Smith, being duly sworn, each for himself says that he is a householder within the district aforesaid, and that he is worth the sum of five thousand dollars in gold coin of the United States of America, exclusive of property exempt from execution and over and above all his just debts and liabilities.

F. A. HASSEY.
HOLLAND SMITH.

Subscribed and sworn to before me this 22d day of November, 1884.

L. S. B. SAWYER,
Com'r U. S. Cir't Court Dist. Cal.

Endorsed: The form of the within bond and the sufficiency of the sureties thereon are hereby approved. (Signed) Lorenzo Sawyer, U. S. circuit judge 9th judicial circuit. Filed Nov'r 22, 1884. L. S. B. Sawyer, clerk.

32 In the Circuit Court of the United States for the District of California.

ABIGAIL R. COLTON
vs.
ELLEN M. COLTON
} No. 3179.

I, L. S. B. Sawyer, clerk of the circuit court of the United States for the district of California, do hereby certify the foregoing thirty-one written and printed pages, numbered from 1 to 31, inclusive, to be a full, true, and correct copy of the record and of all proceedings in the above and therein entitled cause, and that the same together constitute the transcript on appeal to the Supreme Court of the United States in said cause.

Attest my hand and seal of said circuit court this 2d day of April, A. D. 1885.

[Seal of the Circuit Court, District of Cala.]

L. S. B. SAWYER, *Clerk*,
By F. D. MONCTON,
Deputy Clerk.

33 UNITED STATES OF AMERICA, *ss:*

To Ellen M. Colton, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States to be held at the city of Washington, in the District of Columbia, on the second Monday of October, A. D. 1885, pursuant to an order allowing an appeal from the final decree of the circuit court of the United States of America in and for the district of California, wherein Abigail R. Colton is appellant and you are appellee, to show cause, if any there be, why the said decree in the said cause mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Lorenzo Sawyer, judge of the circuit court of the United States for the district of California, this 22d day of November, A. D. 1884, and of the Independence of the United States the one hundred and ninth.

[Seal of the Circuit Court, District of Cala.]

LORENZO SAWYER,
Circuit Judge.

34 [Endorsed:] No. 3178. In the Supreme Court of the United States. Abigail R. Colton, appellant, *vs.* Ellen M. Colton, appellee. Citation. Filed April 1, 1875. L. S. B. Sawyer, clerk U. S. circuit court, district of California, by F. D. Moncton, deputy clerk.

Service of a copy of the within citation is hereby acknowledged this 31st day of March, 1884.

STANLEY, STONEY & HAYES,
Att'ys for Appellee.
CRITTENDEN THORNTON,
Solicitor for Appellee.

Endorsed on cover: California C. C. U. S. No. 226. Abigail R. Colton, appellant, *vs.* Ellen M. Colton. Filed May 22d, 1885.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1887.

Nos. 228 and 229.

MARTHA COLTON,
Appellant,

vs.

ELLEN M. COLTON,
Appellee.

ABIGAIL R. COLTON,
Appellant,

vs.

ELLEN M. COLTON,
Appellee.

BRIEF FOR APPELLANTS.

SHERMAN EVARTS,
WM. M. EVARTS,
Of Counsel for Appellants.

32 In the Circuit Court of the United States for the District of California.

ABIGAIL R. COLTON
vs.
ELLEN M. COLTON
} No. 3179.

I, L. S. B. Sawyer, clerk of the circuit court of the United States for the district of California, do hereby certify the foregoing thirty-one written and printed pages, numbered from 1 to 31, inclusive, to be a full, true, and correct copy of the record and of all proceedings in the above and therein entitled cause, and that the same together constitute the transcript on appeal to the Supreme Court of the United States in said cause.

Attest my hand and seal of said circuit court this 2d day of April, A. D. 1885.

[Seal of the Circuit Court, District of Cala.]

L. S. B. SAWYER, *Clerk*,
By F. D. MONCTON,
Deputy Clerk.

33 UNITED STATES OF AMERICA, *ss:*

To Ellen M. Colton, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States to be held at the city of Washington, in the District of Columbia, on the second Monday of October, A. D. 1885, pursuant to an order allowing an appeal from the final decree of the circuit court of the United States of America in and for the district of California, wherein Abigail R. Colton is appellant and you are appellee, to show cause, if any there be, why the said decree in the said cause mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Lorenzo Sawyer, judge of the circuit court of the United States for the district of California, this 22d day of November, A. D. 1884, and of the Independence of the United States the one hundred and ninth.

[Seal of the Circuit Court, District of Cala.]

LORENZO SAWYER,
Circuit Judge.

34 [Endorsed:] No. 3178. In the Supreme Court of the United States. Abigail R. Colton, appellant, *vs.* Ellen M. Colton, appellee. Citation. Filed April 1, 1875. L. S. B. Sawyer, clerk U. S. circuit court, district of California, by F. D. Moncton, deputy clerk.

Service of a copy of the within citation is hereby acknowledged this 31st day of March, 1884.

STANLEY, STONEY & HAYES,
Att'ys for Appellee.
CRITTENDEN THORNTON,
Solicitor for Appellee.

Endorsed on cover: California C. C. U. S. No. 226. Abigail R. Colton, appellant, *vs.* Ellen M. Colton. Filed May 22d, 1885.

127-300

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1887.

Nos. 228 and 229.

MARTHA COLTON,
Appellant,

vs.

ELLEN M. COLTON,
Appellee.

ABIGAIL R. COLTON,
Appellant,

vs.

ELLEN M. COLTON,
Appellee.

BRIEF FOR APPELLANTS.

SHERMAN EVARTS,
WM. M. EVARTS,
Of Counsel for Appellants.

Supreme Court of the United States,

OCTOBER TERM, 1887.

MARTHA COLTON, Appellant, vs. ELLEN M. COLTON, Appellee.	No. 228.
ABIGAIL R. COLTON, Appellant, vs. ELLEN M. COLTON, Appellee.	No. 229.

BRIEF ON BEHALF OF APPELLANTS.

Statement.

The above-entitled suits were brought by the mother and sister of David D. Colton, deceased, against his widow, to obtain a decree of the Court to enforce certain trust provisions of his will in their favor.

The will of David D. Colton is as follows:

"I, David D. Colton, of San Francisco, make this my last will and testament. I declare that all of the estate

of which I shall die possessed is community property, and was acquired since my marriage with my wife. I give and bequeath to my said wife Ellen M. Colton all of the estate, real and personal, of which I shall die seized, possessed or entitled to. I recommend to her the care and protection of my mother and sister, and request her to make such gift and provision for them as in her judgment will be best. I also request my dear wife to make such provision for my daughter Helen, wife of Crittenden Thornton, and Carrie, as she may in her love for them choose to exercise. I hereby appoint my said wife to be the executrix of this my last will and testament, and desire that no bonds be required of her for the performance of any of her duties as such executrix.

"I authorize and empower her to sell, dispose and convey any and all of the estate of which I shall die seized or possessed, without obtaining the order of the Probate Court or of any court, and upon such terms and in such manner, with or without notice, as to her shall seem best. If my said wife shall desire the assistance of any one in the settlement of my estate I hereby appoint my friend, S. M. Wilson, of San Francisco, and my secretary, Charles E. Green, of San Francisco, to be joined with her in the said executorship, and authorize her to call in either or both of the said gentlemen to be her co-executors; and in case she shall so unite either or both of them with her, the same provisions are hereby made applicable to them as I have before made for her in reference to bonds and duties and powers.

"San Francisco, October 8, 1878.

"DAVID D. COLTON."

Witness, etc., etc.

This will was executed on the 8th day of October 1878, *and the testator died the following day.*

The bills of complaint show that in the year 1869, the testator borrowed from his father his entire prop-

erty, amounting to fifteen thousand dollars, for which he gave his promissory note; that his father died intestate in 1875, and thereupon the testator took up said note, his sister (one of the complainants) relinquishing all rights to it, and gave in exchange to his mother, Abigail R. Colton, his renewal note for the sum of fifteen thousand dollars; that the testator knew at the time of making his will that the income of this fifteen thousand dollars was all that his mother had for her maintenance and support, and that his sister, Martha Colton, had no property of her own, and was entirely dependent on her mother for her support. The testator knew that his mother was an invalid and advanced in years, and needed the constant care of her daughter and attendance of physicians, and that her own income was utterly insufficient to support his mother and sister.

The testator died leaving an estate of more than a million of dollars, and since his death in October, 1878, up to November, 1882, a period of four years, his widow, the sole legatee and devisee under the will, has sent to the testator's mother only about fifteen hundred dollars, and since November, 1882, the testator's mother and sister have received nothing from the estate towards their maintenance and support.

The complainants claim that by the expression in the will, "I recommend to her (my wife) the care and protection of my mother and sister, and request her to make such gift and provision for them as in her judgment will be best," the testator imposed upon his sole legatee and devisee the trust to make some suitable provision for his mother and sister, and that it is a trust that a court of equity will enforce.

The defendant demurred to the bills of complaint, and from the judgment sustaining the demurrers and dismissing the complaint, the complainants appeal to this Court.

First Point.

The direction to his wife in the will of David D. Colton : " I recommend to her the care and protection of my " mother and sister, and request her to make such gift " and provision for them as in her judgment will be best," creates a trust in favor of his mother and sister.

It is not to be disputed that the creation of a trust by no means depends on the use of technical phrases or apt expressions. There is no special language required to create a trust, and though words of technical application are wanting, the Court will impose a fiduciary obligation upon the person holding the legal title to property, if it is clear from the instrument and circumstances of title that such person is not *intended* to be the beneficial owner.

King vs. Dennison, 1 V. & B., at page 273.
Story's Equity Juris., Vol. II., § 972.
Sheet's Estate, 52 Penn St., 257.
Pomeroy's Equity, Vol. II., § 1009.
Bispham's Principles of Equity, § 65.
Jarman on Wills, Vol. I., p. 385.

Whether or not, then, a trust is created, is a matter of intention, and more emphatically so where the instrument of title is a will, in the construction of which the cardinal rule, to which all other rules bend, is to effectuate the intention of the testator. Now, for the discovery of the intention of a testator there are two considerations for the Court, both of which are to be taken together in forming its conclusion : (1) The words of the will and (2) the circumstances of the parties and their relations to each other. These are not to be separated, and it can only be by looking upon the circumstances that the Court can properly discover the meaning intended to be attached to his language by the testator.

Smith vs. Bell, 6 Peters, 68.

Under this point will be considered the language of the will and the rules of construction applicable thereto.

It must be conceded that by the language of his will the testator has clearly expressed *his* wish, at least, that his mother and sister should find "care and protection" from the bountiful provision to his wife in some form, and that a "gift or provision" should in some way be made to them out of his estate. Leaving out of consideration what it is claimed qualifies such wish on his part, he has certainly made it clear beyond doubt in his will that *he* wanted his mother and sister to have *some* beneficial interest in the property left to his wife. Otherwise, after giving the property to his wife, why should he, *as an authentic part of his testamentary disposition*, have recommended to her the care and protection of his mother and sister and requested her to make some gift or provision for them?

Now, *prima facie*, the expressed *wish* of a testator that a thing shall be done shows his *purpose* that it shall be done, and it is for this reason that it has been said that "the wish of a testator, like the request of a sovereign, is equivalent to a command."

See Note: Hill on Trustees, page 116 (73).
Perry on Trusts, Vol. I. (3d edition), p. 121.
Burt vs. Herron, 16 P. F. Smith (Penn.), 400.

This expression of a wish is often the only evidence to guide the Court in discovering the intention of a testator, as in *Burt vs. Herron, supra* where the clause in the will was "I desire that all my just debts, and those of Herron Brothers be paid as soon as conveniently can be after my dissolution;" the testator was not at all bound for the debts of Herron Brothers, and the Court (Judge SHARSWOOD) held that this "desire" operated as a legacy in favor of the creditors of Herron Brothers, and it was enforced in their favor. Now, in the case at bar the testator has

shown what his wish is, not by saying that he wished such and such a thing done, but quite as effectually by requesting his wife to do so and so, with the property given to her.

Now, the only question is whether by the manner and language in which the testator has made known his wish, he has rebutted the *prima facie* evidence of his intention that such wish should be effectuated, by stronger evidence of intention to leave his wish to the possibility of defeat.

"The real question in these cases always is whether "the wish or desire or recommendation that is ex- "pressed by the testator is meant to govern the "conduct of the party to whom it is addressed, or "whether it is merely an indication of that which "he thinks would be a reasonable exercise of the "discretion of the party, leaving it, however, to the "party to exercise his own discretion. That is the "real question" (Vice-Chancellor CRANWORTH, in *Williams vs. Williams*, 1 Sim. (N. S.), 358).

Does then the fact that the testator has expressed his general wish in regard to the disposition of his property in the form of a request to his wife to whom the property is given without explicitly naming her as trustee, and has confided to the exercise of her judgment the manner of carrying out such expressed wish, furnish in this case evidence of an intention on the part of the testator to leave the carrying out of his wish a matter of free choice on the part of his wife, sufficient to rebut the strong evidence of *intention* that his mother and sister shall be cared for contained in the expression of his wish that they should be? Or does not rather the language of the will create that form of trust known in equity as a "precatory trust," and called so merely from the character of the language used in creating it?

Now, it is submitted with deference that the doctrine of precatory trusts, long established in Courts of

Chancery, does not take its rise or find its support in the Roman Law, but is a necessary and logical conclusion from that fundamental principle of the law of trusts that it is immaterial in what language a trust is expressed so long as the trustor makes it clear that his intention is to create a fiduciary relationship. The doctrine of construing trusts, where the intention is clear to create one, from precatory words, can hardly be said to have its foundation in "the customs or institutions" of any country or race, and it was on the ground that "the rule has no foundation in any of our customs or institutions and no place in our law," that the Court in *In re Pennock's Estate* (20 Pa. St. 268), rejected and repudiated the great doctrine of English Courts of Chancery.

Thus, Lord LOUGHBOROUGH, in *Malim vs. Keighly* (2 Ves. Jr., 531), asserted that there was no fair analogy to the Roman Law, in the doctrine of precatory trusts.

And in *Warner vs. Bates* (98 Mass., 274), BIGELOW, C. J., says: "We see no sufficient ground for calling in question the wisdom or policy of the rule of construction uniformly applied to wills in the courts in England and in most of the United States, that words of entreaty, recommendation or wish addressed by a testator to a devisee or legatee will make him a trustee for the person or persons in whose favor such expressions are used, provided the testator has pointed out with clearness and certainty the objects of the trust and the subject matter on which it is to attach or from which it is to arise and be administered. The criticisms which have been sometimes applied to this rule by text writers and in judicial opinions will be found to rest mainly on its application in particular cases, and not to involve a doubt of the correctness of the rule itself as a sound principle of construction. Indeed, we cannot understand the force or validity of the objections urged against it, if care is taken to keep it in subordination to the primary and cardinal rule that the intent of the

testator is to govern, and apply it only where the creation of a trust will clearly subserve that intent."

In the later case of *Hess vs. Singler* (114 Mass., 56), GRAY, C. J., states that "It is a *settled doctrine* of courts "of chancery that a devise or bequest to one person, "accompanied by words expressing a wish, entreaty or "recommendation that he will apply it to the benefit "of others, may be held to create a trust if the subject "and the objects are sufficiently certain."

That doctrine is recognized in the courts of this country.

Foose vs. Whitmore, 82 N. Y., 405.
Lawrence vs. Cooke, 32 Hun, 126.
Willetts vs. Willetts, 35 Hun, 401.
Harrison vs. Harrison's Admrs., 2 Grattan, 1.
Reed vs. Reed, 30 Ind., 313.
Erickson vs. Willard, 1 N. H., 217.
Knox vs. Knox, 59 Wis., 172.
Heard vs. Sill, 26 Georgia, 302.
Van Amee vs. Jackson, 35 Vt., 173.
Negroes Chase vs. Plummer, 17 Md., 165.
Handley vs. Wrightson, 60 Md., 198.
Tolson vs. Tolson, 10 Gill & Johnson (Md.), 159.
Rhett vs. Mason, 18 Grattan (Va.), 541.
Little vs. Bennett, 5 Jones Eq. (N. C.), 156.
Lucas vs. Lockhart, 10 Sm. & M. (Miss.), 466.
Lines vs. Darden, 5 Fla., 51.
Cockrill vs. Armstrong, 31 Ark., 580.
Young vs. Young, 68 N. C., 309.
Collins vs. Carlisle, 7 B. Monroe (Ky.), 13.
Brasher vs. Marsh, 15 Ohio St., 103.
Dresser vs. Dresser, 46 Maine, 48.
Carpenter vs. Miller, 3 W. Va., 174.
Brunson vs. King, 2 Hill Ch. (S. C.), 483.
Warner vs. Bates, 98 Mass., 274.
Hess vs. Singler, 114 Mass., 56.

By a proper application of the rules of construction laid down by the courts in cases similar to the one at bar, it is submitted this Court must construe this pro-

vision of the will to be a *trust* in favor of the mother and sister of the testator.

The general rules to govern the Court in these cases are set out by Lord LANGDALE as follows:

"As a general rule it has been laid down that when property has been given absolutely to any person and the same person is by the giver, who has power to command, recommended entreated or wished to dispose of that property in favor of another the recommendation, entreaty or wish shall be held to create a trust.

FIRST. If the words are so used that upon the whole they ought to be construed as imperative.

SECONDLY. If the subject of the recommendation or wish be certain; and

THIRDLY. If the objects or persons intended to have the benefit of the recommendation or wish be also certain."

Knight vs. Knight, 3 Beav., at page 172.

These general rules of construction are adopted in the following cases:

Harding vs. Glyn, 1 Atk., 469.
Pierson vs. Garnett, 2 Bro. C. C., 38. 226.
Malim vs. Keighly, 2 Ves., Jr., 529.
Shaw vs. Lawless, 1 Lloyd & Gould, 558.
Tibbits vs. Tibbits, 19 Ves., 656.
Foley vs. Parry, 5 Sim., 138.
Same Case, 2 My. & K., 138.
Cruwys vs. Colman, 9 Ves., Jr., 323.
Parsons vs. Baker, 18 Ves., Jr., 476.
Prevost vs. Clark, 2 Mad., 458.
Ware vs. Mallard, 16 Jur., 492.
Shovelton vs. Shovelton, 32 Beav., 143.
Harland vs. Trigg, 1 Bro. C. C., 142.
Le Marchant vs. Le Marchant, L. R. 18 Eq., 414.
Cussick vs. Tucker, L. R. 17 Eq., 320.
And cases cited above.

In the headnote to *Harrison vs. Harrison's Administrators* 2 Grattan 1, is to be found a clear and accurate statement of the circumstances under which a trust will be construed, as follows:

"Precatory words are treated as imperative and "creating a trust where the objects of the precatory "words are certain and the subjects contemplated are "also certain, unless a clear discretion or choice to act "or not to act be given or the prior disposition of the "property import absolute or uncontrollable beneficial "ownership."

And Lord ALVANLY in *Malim vs. Keighly, supra*: "Wherever any person gives property and points out "the object, the property and the way it shall go, that "does create a trust unless he shows clearly that his "desire expressed is to be controlled by the party, and "that he shall have an option to defeat it."

Mr. Bispham, the editor of Hill on Trustees at page 116 (73), *note*, lays down the following as the result of his examination of the authorities and as warranted by the latest writers:

1. Precatory words in a will equally with direct fiduciary expressions will create a trust; the wish of a testator, like the request of a sovereign, is equivalent to a command.

2. Discretionary expressions which leave the application or non-application of the subject of the devise to the objects contemplated by the testator entirely to the caprice of the devisee will prevent a trust from attaching, but a mere discretion in regard to the method of the application of the subject or the selection of the object, will not be inconsistent with a trust.

3. Precatory words will not be construed to confer an absolute gift on the first taker merely

because of failure or uncertainty in the object or subject of the devise.

4. But failure or uncertainty will be an element to guide the Court in construing words of doubtful significance adversely to a trust.

Sir William Grant, in general language, divides a trust into three elements as follows :

"To constitute a valid trust undoubtedly three circumstances must concur : *Sufficient* words to raise it, a definite subject, and a certain or ascertained object."

Cruwys vs. Colman, 9 Ves., Jr., 323.

And it will be found that in all cases where the whole will, though the creative words are precatory, shows a clear intention to impose a fiduciary obligation, the same rules apply as where direct fiduciary expressions are used.

Briggs vs. Penny, 3 MacN. & Gordon, 246.
Bernard vs. Minshull, Johns. (Eng.), 276.
Willets vs. Willets, 103 N. Y., 650.

In *Briggs vs. Penny*, the testatrix left "the residue of her property to Sarah Penny, her executors, administrators and assigns, *well knowing* that she will make a good use and dispose of it in a manner in accordance with my views and wishes." The fact was that Sarah Penny was ignorant of what the testatrix's "views and wishes" were, and so was unable to fulfill the confidence of the testatrix. But the Court held that it was clear that the legatee was not intended to have a beneficial ownership, and held her a trustee for the next of kin, just as would have been done had the testatrix expressly declared that Sarah Penny was to hold the property "in trust," and the purpose of the trust was so indefinitely expressed as to make it impossible for the Court to effectuate it.

In the similar case of *Bernard vs. Minshull* Sir W. PAGE WOOD, in a clear and well considered opinion, followed this decision of *Briggs vs. Penny* and explained clearly the limitations of the rule requiring certainty in the subject and object of a trust provision.

In *Willets vs. Willets*, 103 N. Y., 650, and 35 Hun, 401, the clause of the will was as follows :

"I do give and bequeath to my son Robert Willets, my friends William H. Macy and Charles Griffen, and my nephews John T. Willets and Robert R. Willtes and Edward B. Willets, and my son-in-law Edward Merritt, the survivors and survivor of them, the sum of one hundred thousand dollars, *relying upon them* to dispose of the same for the benefit of such charitable and benevolent and educational purposes as they shall judge will most promote the comfort and improve the condition of the poor ; or in case any of my descendants should become poor and needy then to apply in whole or in part to such descendants."

The Court at Special Term held that though the words were precatory it was clear the testator intended to create a trust, and that the trust he intended to create was void, and that as a consequence the persons named held as trustees for the next of kin.

This decision was reversed at General Term on the ground that the words from which a trust could be raised were only precatory in their character and were not sufficient to show an intention to create a trust, and that therefore the persons named took absolutely in equal proportions. The Court of Appeals, however, upheld the decision at Special Term and held on the opinion of ANDREWS, J. at Special Term that though the words were precatory there was evident intention on the part of the testator to create a trust, and the object of the trust failing as being contrary to Statute, the property should go to the next of kin.

These cases go to show that certainty in the object and subject of the trust is not an *essential* element in

imposing a trust obligation by means of precatory words, and that *precatory* words may show as clear an intention to create a trust as technical expressions, so as, upon the object failing, to make the legatee, trustee for the next of kin, instead of absolute owner.

Second Point.

Under the foregoing "Judicial Rules of Construction,' we proceed to show the validity of the clause in this will as claimed by the appellants.

First. As to the force of the words used by the testator in this case.

Are they not so used that on the whole they should be construed as imperative, or, in other words, do they not show an intention that his wishes as expressed in regard to his mother and sister shall be carried out?

Now, if the testator had *not* intended that his mother and sister should have any beneficial interest in his estate, he certainly would never have "requested" his wife to make provision for them, towards the "care and protection" of them, which he had previously "recommended" to her. That at least is clear; and inasmuch as he *has* requested his wife to make gift or provision for them and recommended to her their care and protection he has shown his intention that his mother and sister should have a beneficial interest in the property left to his wife.

But it is claimed that the other language used by the testator shows it to have been his *intention* that the matter of assuming the care and protection of his mother and sister by making gift or provision for them was left entirely to the wish, the feelings and the caprice of his wife; and that because the "gift or

provision for them," as contemplated by him was to be "such * * * as in his wife's *judgment* will be best," therefore he has left his wife entirely free to afford no care or protection and to *make no gift or provision for them.*

We insist, on the contrary, that by the ordinary meaning of words and the natural construction of the clause in question the *intention* of the testator is found to be this: "I wish my mother and sister to be taken care of and protected by gift or provision out of my property to be made to or for them by my wife; in such gift or provision she is to exercise her *judgment* so as best *to secure that result to them.*" The gift or provision is to be measured by what is needed for the care and protection of his mother and sister, the method of making it and the character of the gift or provision is to be determined by the exercise of his wife's *judgment.* What is a person's *judgment?*

"The process of examining facts and arguments to ascertain propriety and justice."

Webster's Unabridged Dictionary, p. 730.

But, certainly, submitting the fulfillment of his expressed wishes to "the process of examining facts and arguments to ascertain propriety and justice," is not equivalent to saying that his wife may fulfill his wishes or not as she chooses, although in refusing to do so she may fly in the face of all "propriety and justice." The words of the Court in *Harrison vs. Harrison's Administratrix* (2 Grattan, 1) are applicable here:

"A testator's desires in regard to the disposition of his property to be collected from his will ought not to be the less obeyed because he has confided the execution of them to another, unless it appears that he designs to subject his own wishes and expectations to the caprice or inclination of the person so intrusted."

The testator has left the method of the execution of his wish in favor of his mother and sister, expressly to

his wife's *judgment in their interest*, not to her "caprice or inclination;" he has expressed his intention that his wish should be carried out in the best manner possible, but excludes the possibility of a discretion to *defeat* such intention."

Moreover, in considering the language of the testator it is to be observed that the words of recommendation and request are addressed to his wife, and he might well have used such language in the sense of positive direction or command, only clothing his directions in terms of civility.

The Court below has declined to consider the words in this light, and disposes of this view of the language as "too romantic; too largely deficient in the sanctions or the obligations of positive law; too loose and uncertain to be adopted by the courts as a rule of law by which large estates are to be distributed in opposition to the plain, ordinary, actual, matter-of-fact sense of the words of a will" (Opinion, page 15 of Record).

But this view was not too romantic to be adopted by Lord LOUGHBOROUGH in *Malim vs. Keighley*, and by the Supreme Court of Massachusetts in *Warner vs. Bates* (98 Mass., 274), where the Court says, by BIGELOW, C. J., in speaking of precatory words in a will addressed by a wife to her husband: "She might well express "herself in a different language when addressing her "husband from that which she would use towards "strangers, and at the same time intend a similar re- "sult. Words of confidence, entreaty and recommen- "dation were natural and appropriate when used to ex- "press the will of a testatrix who intended to direct "and control the conduct of her husband in a matter "in which the right to give directions and to control "belonged to her. In such a case the words used by "Lord LOUGHBOROUGH (in *Malim vs. Keighley*) "are applicable, 'where a person recommends to an- "'other who is independent of him, there is nothing "'imperative; but if he recommends that to be done

" ' by a person whom he has a right to order to do it
" ' the mode is only civility.' "

Again, by contrasting the words used by the testator in the provision for his mother and sister and those used immediately following in the provision for his daughters, we find evidence that the testator intended in the former that his wishes should not be controlled by the mere choice of his wife. In regard to *her* children, he uses language from which there can be no doubt but that he left the provision to them as a mere matter of *choice* on the part of Mrs. Colton in a matter where the love of a mother might be trusted to control as well as the duty of a father. He says in so many words that the provision he requests her to make for them is such as " she may *in her love for them choose* to exercise." The testator has by his own words construed the provision for his mother and sister. He has, when he *intended* his wishes to be controlled by the choice or wish of Mrs. Colton, *so expressed himself*, and has thereby given conclusive evidence that had he intended his wishes as expressed in regard to his mother and sister to be so controlled he would have *so expressed himself* in that clause also.

By a fair, impartial and careful examination and discrimination of the language of the testator as used in this will, it is submitted that the words are so used that on the whole they should be construed as imperative.

Expressions identical with those used in the present case, and others not so strong as these, have frequently been held by the Courts to create a trust.

Harding vs. Glyn, 1 Atk., 469.
See also Cases cited in note, II. Pomeroy's Equity, page 580.

SECOND. As to the definiteness of the subject of the trust.

The rule requiring certainty or definiteness in the

private papers. He put them down in the room he occupied, but I paid no further attention to them. He never showed them to me. I do not remember what the papers were in, but think they were in a cloth bag of dirty color but had been white.

Q. 24. What became of those papers?

Ans. I think they are now in my room on said "Home place;" at least they were there when I left last Sunday. I do not know that they are the same papers, but Asa Hodges told me they were.

Q. 25. How long after the death of Fleming Price did you first see Asa Hodges with the bag of papers that he said were Fleming Price's?

161 Ans. I do not think I saw him with the papers; he told me they were in his room. I think he told me this after Price's burial. It was a month or more after that before my attention was called to these papers being in my room.

Q. 26. Were they put in your room in the same bag you first saw them in?

Ans. Well, now, I am not certain about that; I paid so little attention to the matter that I cannot say I recollect about it.

Q. 27. When you left there last Sunday were they in the same bag you first saw them in?

Ans. I think they were, but am not certain.

Q. 28. Did you examine those papers?

Ans. I looked into them a little about the last of August last at the request of nobody, but just to satisfy myself as to what was in the bag.

Q. 29. Was that the first time you had ever looked at them?

Ans. Yes; and the only time.

162 Q. 30. How old was Fleming Price at the time of his death?

Ans. I reckon about 35 or 36 years old.

Q. 31. Has any one taken out letters of administration on his estate in Arkansas?

Ans. Yes; W. D. Hardin, last August or October.

Q. 32. At whose request did Hardin take out letters of administration and what lawyer made the application for him?

Ans. I do not know—to both questions; I did not have anything to do with it.

Q. 33. Has Hardin ever applied for or gotten Price's private papers that you *that you* have spoken of?

Ans. Not that I know; he has never applied to me for them.

Q. 34. Has he ever seen them?

Ans. I do not know that.

Q. 35. Where does said W. D. Hardin live now and what is his business?

Ans. He lives on the farm known as the Hardin place, adjoining Judge Asa Hodges' "Home place," and is a farmer.

163 Q. 36. Where do you live now?

Ans. My home is North Alabama, at Moulton, but am residing at present in Arkansas, or Judge Hodges' "Home plantation," temporarily.

Q. 37. For how long have you resided on said "Home place?"

Ans. About one or two months in every year; I make that my headquarters when I am down there.

Q. 38. Have you spent more of your time, say, for four years past, at your said place of residence in Arkansas or at your home in North Alabama?

Ans. I can hardly answer that; I try to so arrange my affairs as to be at both places when the court's in session; since my wife died I have spent most of my time in Arkansas at said "Home place;" my wife died about two years ago.

Q. 39. What relation are you to Asa Hodges, or to his late wife, Mrs. C. S. T. Hodges?

Ans. None to either.

164 Q. 40. Were you not, since 1876, the general counsel of Asa Hodges and his wife?

Ans. Yes, sir.

Q. 41. Did you attend to generally all of their lawsuits since that time?

Ans. I believe I have; he has had no lawsuits that I have not been engaged in as their attorney, either fully or in part.

Q. 42. Were you not engaged by Asa Hodges as one of his attorneys or lawyers in this suit?

Ans. I was at first, but my understanding now is that I go out of it; that understanding I got from Judge Hodges before the answer was filed.

Q. 43. State the conversation between you and Judge Hodges in which he gave you to understand that.

Ans. He told me that he would want to examine me as a witness, and I said if that was so I could not act as counsel in the case.

Q. 44. Who wrote the answer of Asa Hodges in this case?

165 Ans. I think I wrote it; I have not seen it on file, but I wrote one.

Q. 45. Do you now pay board at Asa Hodges', and does he pay you fees to attend to his law business?

Ans. I do not pay any board, and I expect him to pay me fees for attending to his law business, except this case.

Q. 46. In the large amount of law business you have attended to for him since 1876 has he ever paid you any specific fee for any particular case? If so, name it.

Ans. He has paid me a good deal of money; he has paid my expenses and probably $500 or $600.00 altogether, and has furnished me supplies, and his wife has conveyed me about 800 acres of bottom land, known as the Peters place, in Crittenden county, Arkansas. She conveyed it to me last winter; this conveyance was for services. The 800 acres is worth about $4,000.00; but I never did charge him any specific amount for a fee, and he never agreed to pay me

166 any specific amount for a fee, but has always paid me liberally for all the services I have done.

Q. 47. Do you know what crops were grown on the Arnold place during the year 1880 and what became of them?

Ans. No; I do not know of my own knowledge.

subject matter of the trust is applicable to the upholding of *any* trust provision made by a testator, even where he has expressed his intention to create a trust in undisputed technical language. The rule is not peculiarly applicable to *precatory* trusts. And if this provision of the testator for the care and protection of his mother and sister is sufficiently definite for the Court to enforce, had the expressions creating it been technically fiduciary, then, also, is it sufficiently definite where the inartificial language of the whole will shows as clearly as in this case that the testator intended that his mother and sister should have a beneficial interest in the estate.

The weight to be given by the Court to the fact that the testator has not set out in so many words the exact sum of money which should be applied to the care and support of his mother and sister from year to year, or that he has not designated any principal amount to be set apart by his wife for such purpose is not governed by an arbitrary rule of construction which would defeat the raising of a trust from the very fact. It can only be considered in the light of evidence and argument for what it may be worth that the testator did not intend to create a trust.

Wright vs. Atkyns, Turn & Russ, 159.
Morice vs. Bishop of Durham, 10 Ves., 536.

And it has been shown by the decisions in *Briggs vs. Penny, Bernard vs. Minshull* and *Willets vs. Willets* that an indefiniteness in the subject does not override the clear intention of the testator to create a trust. Now, in those cases where indefiniteness and uncertainty in the subject have been held to defeat the raising of a trust, it will be found that the indefiniteness arose from a direction as to the disposition of a *remainder* or *surplus* after the property had been applied to the use of the first taker, showing clearly that

the subject of the trust depended on the discretionary use of the property by the first taker.

In re Pennock's Estate, 20 Pa. St.
Hess vs. Singler, 114 Mass., 56.
Eade vs. Eade, 5 Mad., 118.
Wynne vs. Hawkins, 1 Bro. C. C., 179.
Pushman vs. Filiter, 3 Ves., 7.

Such a direction would be construed as showing clearly that the amount depended solely upon the wish or desire of such first taker, and that it was the intention of the testator to subject his own wishes as to the beneficial enjoyment of the property to the wishes of such first taker.

But in this case there is no such provision ; the beneficial interest, so long as it lasts, in the estate is contemporaneous with the legal ownership. It does not cut down that ownership to a mere life interest in any portion of the estate. The amount is not measured by the testator by what is left undisposed of. The indefiniteness does not arise from requesting his wife to give to his mother and sister what may remain after her own use of the property is satisfied. The measure of the beneficial interest is clearly stated to be the "care and protection" of his mother and sister. Whatever is consistent with that is the amount which the testator clearly intended should be subjected to the trust which he has created.

This measure of the *quantum* of the estate to which the beneficial interest of the mother and sister is to attach is a measure which a court of equity will recognize and apply. The amount which a judgment honestly exercised, in the interest of the beneficiaries will apply towards their "care and protection" can be ascertained ; and when it is clear that a *trust* is created the language of the testator expresses a purpose sufficiently definite to be executed by the Court. Sir James Wigram, in *Thorp vs. Owen* (2 Hare, 607), draws this conclusion from the authorities, namely, that

"Whatever difficulties might originally have been supposed to exist in the way of a court of equity enforcing a trust, the extent of which was unascertained, the cases appear clearly to decide that a court of equity can measure the extent of interest which an adult, as well as an infant, takes under a trust for his support, maintenance and advancement, provision, or *other like indefinite expression*, applicable to a fund larger confessedly than the party entitled to the support, maintenance or advancement can claim, and some interest in which is given to another person."

Broad vs. Beavan, 1 Russ., 511, note.
Wetherell vs. Wilson, 1 Keen, 80.
Woods vs. Woods, 1 Myl. & Cr., 401.
Pride vs. Fooks, 2 Beav., 430.
Jubber vs. Jubber, 9 Sim., 503.
Kilvington vs. Gray, 10 Sim., 293.
Soames vs. Martin, 10 Sim., 287.
Gilbert vs. Bennett, 10 Sim., 371.
Alexander vs. McCulloch, 1 Cox Ch. C., 391.
Raikes vs. Ward, 1 Hare, 445.
Crockett vs. Crockett, 1 Hare, 451.
Hamley vs. Gilbert, Jac., 354.
Thurston vs. Essington, Jac., 361.
Connolly vs. Farrel, 8 Beavan, 347.
Donovan vs. Van de Mark, 78 N. Y., 244.
Chase vs. Chase, 2 Allen (Mass.), 101.

The case of *Warner vs. Bates*, 98 Mass., 274, a leading case on this question, was not unlike the case at bar.

In that case the provision of the will was as follows: "I give and bequeath to my husband, George Bates "aforesaid, the use, income and improvement of all the "estate, real, personal and mixed, of which I shall die "seized and possessed for and during the term of his "natural life, in the full confidence that upon my de- "cease he will, as he has heretofore done, continue to "give and afford my children (enumerating them) such "protection, comfort and support as they or either of "them may stand in need of;" and it was held that

these words subjected the use and income to a trust which could be enforced in equity.

In *Foley vs. Parry* (2 Myl. & K., 138), where a testator gave his real estate and all his residuary property to his wife for life, with remainder to an infant great-nephew for life, a statement in the will that it was his particular wish and *request* that his wife and the infant's grandfather would superintend and take care of the infant's education, so as to fit him for any respectable profession or employment was held, under the circumstances, and upon the effect of the whole instrument, to charge the maintenance and education of the infant upon the interest taken by the testator's widow under the will.

THIRD. As to the language of the testator, by which he leaves the property to his wife, does that import such absolute and uncontrollable beneficial ownership in her as to defeat the raising of a trust?

It is true if there were no other words to the will than these: "I give and bequeath to my said wife, Ellen M. Colton, all of the estate, real and personal, of which I shall die seized, possessed or entitled to," the wife would be the legal and beneficial owner of the entire estate, free from any obligations. But, in the words of Chief-Justice MARSHALL in *Smith vs. Bell*, 6 Peters, at page 76, "No rule is better settled than that the whole will is to be taken together, and is to be so construed as to give effect, if it be possible, to the whole."

If the whole will is taken in this case, it is clear that the words of bequest are qualified by the subsequent words imposing an obligation. It is not, under the rules governing precatory trusts, because a bequest is made to the first taker that the Court will decline to raise a trust. That the person upon whom the obligation is imposed is first made a legatee or devisee *is always one of the given facts* in the case of a precatory trust. But it is where the testator has in addition to

the language of mere gift used words signifying beyond doubt that he did not intend *anything* to take away from the absolute use and beneficial enjoyment of the property by the legatee, that the Courts have held that no trust could be raised. An instance of such language is that used by the testator in the case of *Meredith vs. Heneage*, 1 Sim., 553, where the property was left with the expressed wish that the legatee should hold it "*unfettered and unlimited.*"

See also cases cited in II. *White and Tudor's Leading Cases in Eq.* (6th Edition), p. 1087.

Such additional affirmative words make the clear intention as to the beneficial ownership *inconsistent* with the raising of a trust.

No more does the authority to sell given in the latter part of the will militate against the raising of a trust.

See Salomon vs. Lawrence, 52 N. Y. Superior Ct. Reports, 164.

The power of sale and disposal of the property given to his wife in the latter part of the will clearly applies to the administration of the estate by the wife as executrix. It is evident by its provisions that the testator intended that his wife in such administration should not be restricted in her action as executrix, by any regulations of statute which might require "obtaining the order of the Probate Court or of any Court," or which might require her to give notice.

On the other hand if, as the appellee claims, this provision applies to her ownership as legatee and devisee, what possible application can it have except to show that the testator intended by the provisions for his mother and sister to qualify and restrict the gift to his wife by a trust? If he had not intended to so restrict the gift, or her beneficial interest in it, then the authority to sell and dispose of the property, the right

of alienation given, has no more force than a mere redundancy. This subsequent provision then, if at all applicable to his wife's position as legatee or devisee, shows that although he intended to confine to some extent her beneficial interest in the property, he did not intend to restrict her in the legal ownership by depriving her of the power of sale. The removal of any such restriction, which might have been inferred as existing but for the subsequent provision is not inconsistent with the creation of a trust.

Third Point.

The situation and relationship of the parties show that it was the intention of the testator to impose a trust on the property in favor of his mother and sister.

How forcible is the language of the Court in *Smith vs. Bell, supra*, when applied to the case at bar! Chief-Justice MARSHALL there says: "In the construction of ambiguous expressions, the situation of the parties may very properly be taken into view. The ties which connect the testator with his legatees, the affection subsisting between them, the motives which may reasonably be supposed to operate with him and to influence him in the disposition of his property, are all entitled to consideration in expounding doubtful words and ascertaining the meaning in which the testator used them."

Calling, then, the circumstances and situation of the parties to our assistance as a guide in determining whether or not the testator intended to impose a trust upon the estate, toward what conclusion do they direct?

In the first place, there existed the strong natural ties of filial and fraternal relationship. Moreover, the testator knew that his mother was advanced in years, that she was an invalid, that she needed the constant attendance of physicians, and that her only means of subsistence, that she could call her own, was the income of fifteen thousand dollars. He knew that his sister had relinquished all her rights in their father's property and shared with his mother the income of his mother's small property, and that her life had been devoted to the care of his mother in her sickness. The testator, moreover, owed to some extent a debt of gratitude to these two, from the fact that his large fortune had its beginning in the money borrowed from his father, and borrowed again on his father's death from this mother and sister.

These facts should not, we conceive, be passed lightly over, but are entitled to deliberate consideration in their bearing upon the proper construction of this will. The reason and the incentives for making his mother and sister objects of his dutiful and solicitous care and protection were as strong to influence this testator as they well could be, and their proper consideration must give to the words of the will a still clearer expression of his intention that his wishes for their benefit should be fulfilled.

Fourth Point.

A court of equity will inquire into the acts of a trustee, and, if the trust is not in good faith executed, but is rendered nugatory by the refusal of the trustee to exercise a reasonable discretion entrusted to him, the Court will enforce the execution of the trust according to the intention.

The authorities are clear in showing that the "judgment" or "discretion," reposed under a trust obligation means an *honest* discretion to be exercised in the interest of the beneficiaries of the trust and not of the trustee.

In the leading case of *Costabadie vs. Costabadie* (6 Hare, 410) The Vice-Chancellor, Sir JAMES WIGRAM, in stating the limits of the "discretion" given to a trustee, says (at page 414): "If the gift be subject to the "discretion of another person, *so long as that person* "*exercises a sound and honest discretion*, I am not aware "of any principle or any authority upon which the "Court should deprive the party of that discretionary "power. *Where a proper and honest discretion is exer-* "*cised*, the legatee takes all that the testator gave, or "intended that he should have, that is, so much as *in* "*the honest and reasonable exercise of that discretion* he "is entitled to. That is the measure of the legacy." He then lays down the rule that, consistently with the *cestui que trust* having an interest, subject to discretion, he has the right to a discovery of the property, in respect of which the interest exists, and of the acts of the trustee, and he thus proceeds: "She has that "right in order that the Court may be able to see "whether the discretion which has been exercised by "the party intrusted with it is within the limits of a "*sound and honest* execution of the trust."

Sir RICHARD MALINS, in *In re Hodges, Davey vs. Ward*, L. R., 7 Ch. Div., at page 792, quotes from the opinion of Sir JAMES WIGRAM, and concludes, "Therefore the "view I have always acted upon, which, I think, is the "proper view * * * is this, that where the trustee acts "in the exercise of his discretion, it is incumbent upon "the Court to pay every respect to that exercise, *but* "*it must consider whether it is properly done;* adopting "the language of Sir JAMES WIGRAM, * * * the "Court must consider whether it is *an honest and* "*proper discretion.*" In the above case of *Davey vs.*

Ward the Court controlled the discretion of the trustees and exercised its own discretion.

In *Haydel vs. Hurch*, 5 Mo. App., at page 275, the Court (LEWIS, P. J.), speaking of a trustee's discretion, says: "It was not to be a mere *capricious, unques-* "*tioned* exercise of the *preferences* of the trustee, or a "ready indulgence of all the wishes of the beneficiary, "but a discretion to be employed with a *prudent refer-* "*ence to the condition of the estate, and the style of living* "*for which it might be drawn upon without serious* "*detriment to the fund.*"

In Perry on Trusts, Vol. ii., § 511a, these general rules are laid down:

"(1) Where a power of electing is given to trustees, "as to the rights of third persons, they are bound to "exercise such power most beneficially for the *cestuis* "*que trustent.*"

Haynesworth vs. Cox, Harp Eq. Rep., 149.

"(2) Reference must always be had, in the execu- "tion of a power, *to the end or purpose intended,* by the "creator of the power, * * * and a power must "always be *executed bona fide for the end and purpose* "*designed.*"

Costabadie vs. Costabadie, 6 Hare, 410.
Hamley vs. Gilbert, Jacob's Rep., 345.
Saunders vs. Schmaelze, 49 Cal., 59.
Hawkins on Wills, 160.
Haydel vs. Hurck, 5 Mo. App., 267.
Wormeley vs. Wormeley, 8 Wheaton, 421.
2 Perry on Trusts, Sections 511, 511*a*.
1 " " " Section 255.
Gower vs. Mainwaring, 2 Ves., 87.
Schouler's Ex'ors. & Admrs., Sec. 267.
Pomeroy's Equity Jur., §§ 153, 991.
Arnold vs. Gilbert, 5 Barb. (N. Y.), 190.
Power vs. Cassidy, 79 N. Y., 602.
Coates vs. Woodworth, 13 Ill., 654.
Jordan vs. Jordan, 2 Law Rep.(N. C.), 409.
Jones vs. Dougherty, 10 Ga., 273.
Willett vs. Carroll, 13 Md., 459.

Raikes vs. Ward, 1 Hare, 445.
Erisman vs. Directors of Poor, 47 Pa. St., 509.
Pulpress vs. African Church, 48 Pa. St., 210.
Carson vs. Carson, 1 Wins. (N. C.), 24.
Davey vs. Ward, L. R., 7 Ch. Div., 754.

It needs no argument to show that the discretion reposed by the testator in his wife in the present case has been grossly abused, and indeed substantially not exercised at all. It is only necessary to recur to the circumstances surrounding the testator's mother and sister, and the entirely inadequate sums heretofore contributed by the testator's wife out of the estate towards their "care and protection," and to the size of the estate out of which the "gift or provision" was to have been made, to show that there has been the exercise of no *honest* discretion on the part of the testator's widow, but that she is influenced in her action solely by selfish motives, entirely in her own interest.

Fifth Point.

This Court has jurisdiction to enforce the execution of this trust.

It is urged on the part of the appellee that the Probate Court in California having distributed the estate to the sole legatee and devisee under the will has, by such decree, rendered its decision adversely to a trust; that the Probate Court had jurisdiction to pass on the question of whether or not there was a trust and, although the question was not before the Court on the granting of the decree of distribution, such decree determined that question.

But, the decree of distribution of the property and delivery to Mrs. Colton as legatee, created the very situation out of which by the will the trust arises. What objection could have reasonably been interposed by the mother and sister to the entry of a decree upon which the property was transferred into the widow's hands, so as to create the very foundation of their present claim under the will? It was not to be presumed that the widow would refuse to execute the trust thus created, and if she does so refuse, it is clearly within the jurisdiction of a court of equity to enforce it. The decree of distribution determined nothing more than who was the distributee under the will (see Sec. 1911, Code Civil Procedure, Cal.). The appellee does not claim that any adjudication was made for or against the raising of a trust, and the fact that under the statutes of California jurisdiction is given to the Probate Court to pass on these questions, cannot affect or limit the equity jurisdiction of the Federal Courts which is coextensive with the English Court of Chancery.

Mr. Justice CAMPBELL says, in *Hyde vs. Stone*, 20 Howard, 170–175, delivering the opinion of the Court, that "the Court has repeatedly decided that the jurisdiction of courts of the United States over controversies between citizens of different States cannot be impaired by the laws of the States which prescribe the modes of redress in their courts or which regulate the distribution of their judicial power."

In *Payne vs. Hook*, 7 Wall., 425, it was decided that the jurisdiction of the Circuit Court of the United States, in a case for equitable relief was not excluded, because, by the laws of the State, the matter was within the exclusive jurisdiction of its Probate Courts.

See *Ellis vs. Davis*, 109 U. S., 485.
Williams vs. Benedict, 8 How., 107.
Bank vs. Horn, 17 How., 160.
Youley vs. Lavender, 21 Wall., 276.

Taylor vs. Carr, 20 How., 583.
Freeman vs. Howe, 24 How., 454.
Hook vs. Payne, 14 Wall., 255.

Last Point.

The decrees of the Court below should be reversed and the demurrers overruled.

SHERMAN EVARTS,
WM. M. EVARTS,
Of Counsel.

24-500

Nos. 225 and 226.

In the Supreme Court of the United States

OCTOBER TERM, 1887.

MARTHA COLTON,
Appellant,
vs.
ELLEN M. COLTON,
Appellee.

No. 225.

ABIGAIL R. COLTON,
Appellant,
vs.
ELLEN M. COLTON,
Appellee.

No. 226.

BRIEF FOR

Taylor vs. Carr, 20 How., 583.
Freeman vs. Howe, 24 How., 454.
Hook vs. Payne, 14 Wall., 255.

Last Point.

The decrees of the Court below should be reversed and the demurrers overruled.

SHERMAN EVARTS,
WM. M. EVARTS,
Of Counsel.

24-300

Nos. 228 and 229.

In the Supreme Court of the United States,

OCTOBER TERM, 1887.

MARTHA COLTON,
Appellant,
vs.
ELLEN M. COLTON;
Appellee.
No. 228.

ABIGAIL R. COLTON,
Appellant,
vs.
ELLEN M. COLTON,
Appellee.
No. 229.

BRIEF FOR APPELLEE.

JOHN A. STANLY,
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For Appellee.

IN THE SUPREME COURT

OF THE

UNITED STATES.

MARTHA COLTON, *Appellant,* vs. ELLEN M. COLTON, *Appellee.*	*No. 228.*
ABIGAIL R. COLTON, *Appellant.* vs. ELLEN M. COLTON, *Appellee.*	*No. 229.*

BRIEF FOR APPELLEE.

As at the time we write we are unable to see the brief for appellants, we shall preface this brief with a short statement of the facts:

David D. Colton, died in San Francisco, October 9th, 1878. On the preceding day he

made a will which is in the following words and figures. (Attestation clause omitted.)

"I, David D. Colton, of San Francisco, make this my last will and testament. I declare that all of the estate of which I shall die possessed is community property and was acquired since my marriage with my wife. I give and bequeath to my said wife, Ellen M. Colton, all of the estate real and personal, of which I shall die *siezed*, possessed or entitled to. *I recommend to her the care and protection of my mother and sister, and request her to make such gift and provision for them as in her judgment will be best.* I also request my dear wife to make such provision for my daughter, Helen, wife of Crittenden Thornton, and Carrie, as she may in her love for them choose to exercise, I hereby appoint my said wife to be the executrix of this my last will and testament, and desire that no bonds be required of her for the performance of any of her duties as such executrix.

I authorize and empower her to sell, dispose and convey any and of all of the estate of which I shall die *siezed* or possessed, without obtaining the order of the Probate Court or of any Court, and upon such terms and in such manner, with or without notice, as to her shall seem best.

If my said wife shall desire the assistance of any one in the settlement of my estate, I hereby appoint my friend, S. M. Wilson, of San Francisco, and my Secretary, Charles E. Green, of San Francisco, to be joined with her in the said executorship, and authorize her to call in either

or both of the said gentlemen to be her co-executors; and in case she shall so unite either or both of them with her the same provisions are hereby made applicable to them as I have before made for her in reference to bonds and duties and powers.

San Francisco, October 8th, 1878.

DAVID D. COLTON."

(*Folios 9, 10.*)

The testator left him surviving his widow, the appellee, and two daughters. The appellants are the mother and sister of the deceased referred to in the words of the will which we have italicised. They reside together in the City of New York, and the appellant Martha is, and ever since her father's death has been, supported by her mother, the appellant Abigail R. Colton, who, it is alleged, is possessed of no other property than the sum of $15,000, which she has had loaned out at interest since March, 1877. (*Folios 5, 6, 7.*)

The will of the deceased was duly admitted to probate in the proper Court on the 29th day of October, 1878, and on the 18th day of December, 1879, "by an order or decree of said Probate Court then and there duly made and entered, the whole estate, real and personal, of the said David D. Colton then remaining was distributed to" the appellee. (*Folio 3.*)

On six occasions during the year 1880 appellee sent to the appellant, Abigail R., sums of fifty dollars each. In February, 1881, the sum of six

hundred dollars; and in November, 1882, the sum of six hundred dollars. (*Folio 4.*)

Without in any way expressing any dissatisfaction with the sums so sent, or complaining that her own means and the sums so sent her were at all insufficient for her wants, she, on or about October 20th, 1883, caused to be served upon the appellee in San Francisco a demand "that she execute the terms and directions of the last will and testament of the said David D. Colton, and that from his estate so as aforesaid distributed to the defendant she make a suitable provision for" her, the said Abigail R.

No intimation of what would be such "suitable provision" is given.

On November 20th, 1883, the appellant verified the bill in the case at bar in New York, and on December 11th, 1883, it was filed in the Court below.

The bill was demurred to by appellant, and after argument the demurrer was sustained and the bill dismissed September 22d, 1884. From the decree of dismissal this appeal is prosecuted.

I.

The decree of the Probate Court of the City and County of San Francisco in the Matter of the Estate of D. D. Colton, deceased, distributing the whole of the estate to the appellant, was a complete and final adjudication as to all parties claiming, as heirs, legatees or devisees, any interest legal or equi-

table in or to the estate, and is therefore a bar to the present suit.

(*A.*) The Probate Court had the exclusive jurisdiction, of the matter of the distribution of the estate.

Auguisola vs. *Arnaz*, 51 Cal., 439.

(*B.*) And in distributing the estate, equitable interests in, and trust charges upon, the property were equally within its province and duty to enquire into and determine.

"The former order of the Probate Court distributing the entire estate to the executrix as sole devisee under the will was the final order of the Court in the matter of the estate, and its effect, unless subsequently modified or reversed on appeal, was a final disposition of all the funds of the estate, *and an investiture of the absolute right and title thereto in the executrix as sole devisee.*"

Estate of Garraud, 36 Cal., 279, 280.

"By the law of this State the Probate Court is a Court created by the Constitution, and has jurisdiction over matters relating to the settlement of the estates of deceased persons; among other matters, 'to distribute the residue of the estate * * among the persons who, by law, are entitled thereto.' (Sec. 1665, C. C. P.) *If a trust is attempted to be created this Court must determine how far the attempt is successful, what is the trust, who is the trustee, and who are the beneficiaries, and distribute accordingly.* The decree of distribution, founded upon the will, is the war-

rant or charter of the trustees, and by it the objects and purposes of the trust are expressed."

Estate of Crooks, Myrick's Prob. Rep., 249.

"It may truly be said that it would be unprofitable for this Court to inquire into the mode of administering the trust, which may (not necessarily must) fall under the supervision of a Court of Chancery; but it *is* profitable, *it is not only the province, but it is, under our system, the necessary province of a Probate Court, to inquire and determine whether a valid trust has been created.* The mode of administering, the power to regulate and direct its subsequent administration, is quite separate and distinct from a question of whether a legal trust is expressed. So in regard to whether all the objects of the trust are legal or not. Section 1665, C. C. P., provides that "the Court must proceed to distribute the residue of the estate * * among the persons who, by law, are entitled thereto. A trustee of a devise takes no estate unless there is a legal valid trust created. The trust attempted to be created may be legal in part and illegal in part. This Court in making distribution must determine how far the trust is legal and how far illegal. The decree of distribution founded upon the will, *is the warrant or charter of the trustees*, and by it the general objects of the trust are expressed.

Estate of Hinckley, Myrick's Prob. Rep., 194.

The decision above quoted from was, as to the point under consideration, affirmed on appeal by the Supreme Court (58 Cal., 518). After quoting from the opinion of the Court below, the Supreme Court say: "With this view of the learned Judge we are in full accord. We may add that it is within the province of the Probate Court *to define the rights of all* who have legally, *or equitably*, any interest in the property of the estate *derived from the will*, whether they are entitled to any present enjoyment, *or their interests are contingent.*"

(*C.*) Courts of Probate in these days, and in this country, have not merely succeeded to the lame and inefficient jurisdiction of the ecclesiastical courts, on the contrary they have attained such a growth by the transfer of powers formerly possessed by Courts of Equity that they are now, by the force of State constitutions and legislation, armed with complete power to determine all questions involved in the administration or distribution of the estates of decedents. After reviewing the probate system of this State in Broderick's will case (21 Wall., 217), Mr. Justice Bradley said: "In view of these provisions it is difficult to conceive of a more complete and effective probate jurisdiction, or one better calculated, to attain the ends of justice and truth."

We have already seen that in distributing the estate it was the right and *the duty* of the Probate Court to construe the will on this question of the existence or non-existence of a trust in favor of

the complainants. Had it determined that such trust existed, while it would have distributed the legal title to the defendant, it would have distributed it expressly and in terms *charged with the trust.*

Estate of Molk, Myrick's Prob. R., 212.
Estate of Glass, Myrick's Prob. R., 214.

And the decree so charging the property with the trust would in the language of the Court in the Estate of Hinckley, *supra*, have been "the charter of the trustee."

If the estate had been distributed so charged with the trust, undoubtedly thereafter a Court of Equity would superintend, if necessary, the administration of the trust and enforce the performance by the trustee of his duties.

(*D.*) The decisions of the Courts of a State as to the construction of its own Statutes, and therefore as to the jurisdiction of its tribunals, are binding on the Federal Courts.

Shelby vs. *Guy*, 11 Wheat, 367.
Christy vs. *Pridgeon*, 4 Wall, 203–4.
Johnston vs. *Straus*, 26 Fed. Rep., 69.

(*E.*) The Probate Court then possessing such jurisdiction, and having exercised it, its decree, like that of any Court of competent jurisdiction, is final and conclusive as to the rights of all parties claiming under the will, whether such claims be based on legal or equitable grounds.

Cal. Code of Civil Procedure. Sec. 1666.

This Section of the State Code of Civil Procedure refers to the decree of distribution, and is as follows:

"In the order or decree the Court *must* name the persons, and *the proportions or parts* to which each shall be entitled. * * * * Such order or decree *is conclusive* as to the rights of heirs, legatees or devisees, subject only to be reversed, set aside or modified on appeal."

Story's Equity Pleading. Secs. 780–783.
Loring vs. *Steinman*, 1 Metc., 208–9.
Colt vs. *Colt*, 111 U. S. S. C., 566.
Broderick's Will Case, 21 Wall, 509.

On the question of the jurisdiction of the Courts of Probate to construe a will, determine equitable questions, and distribute estates even if held in trust, we refer the Court to

Matter of Verplanck, 91 N. Y., 450.
Riggs vs. *Cragg*, 89 *Id.*, 492.
Teed vs. *Morton*, 60 *Id.*, 502.
Bascom vs. *Albertson*, 34 *Id.*, 584.
Stagg vs. *Jackson*, 1 *Id.*, 206.
Dundas' Appeal, 73 Pa. St., 474.
Whiteside vs. *Whiteside*, 20 *Id.*, 473.
McGettrick's Appeal, 98 *Id.*, 12.
Shollenberger's Appeal. 21 *Id.*, 340.
Tryon vs. *Farnsworth*, 30 Wis., 580-1.
Brooks vs. *Chappell*, 34 *Id.*, 411-12.
Appeal of Schaeffner, 41 *Id.*, 260.

(*F.*) The complainants are within the classes enumerated in Section 1666 C. C. P., as the pro-

vision of the will on which they rely is either a legacy or devise or it is nothing.

Sparks vs. *De la Guerra*, 14 Cal., 108, 112.
Vide also
Freeman vs. *Rahm*, 58 Cal., 114, 115.

(*G.*) Conceding for the purpose of the argument that the decree of the Probate Court distributing the estate is not set forth in the bills with the fullness and particularity that would be required of the defendant in a plea, it is not necessary for the purpose of the demurrer that it should be, as in equity as well as at law every right is to be taken most strongly against the pleader and as against him the language used is to be understood in its natural import in the connection, and with reference to the subject matter. Under this rule the language in the bills that the Decree of Distribution was "duly made and entered" imports jurisdiction in the Probate Court irrespective of the Code rule of pleading judgments prevailing in California.

Vide:

Pennington vs. *Gibson*, 16 How. U. S., 80, 81.

II.

Under the law of the State of California, in which this will was made, and where the estate upon which it operated is situate, no trust was created by the will in favor of the appellants. The

doctrine of precatory trusts has not yet been recognized in that State and should not be.

It is contended by appellants, that the portion of the will quoted in italics in the opening part of this brief, created a precatory trust in their favor.

It indicates no rash presumption on our part to say that the whole doctrine of these so-called precatory trusts was the result of judicial usurpation. It has met with the unqualified condemnation of many of the most eminent judges and text-writers in modern days, repudiated by the Courts of some States, and is deprecated in almost all where it has come under consideration.

"The doctrine of thus construing expressions of recommendation, confidence, hope, wish and desire into positive and peremptory commands, is not a little difficult to be maintained upon sound principles of interpretation of the actual intention of a testator. It can scarcely be presumed that every testator should not clearly understand the difference between such expressions and words of positive direction and command, and that in using the one and omitting the other, he should not have a determinate end in view. It will be agreed on all sides that where the intention of the testator is to leave the whole subject as a pure matter of discretion to the good will and pleasure of the party enjoying his confidence and favor, and where his expressions of desire are intended as mere moral suggestions to excite and aid that discretion, but not absolutely to control or govern it, there the language cannot and ought not to be

held to create a trust. Now words of recommendation, and other words precatory in their nature, *imply that very discretion*, as contradistinguished from peremptory orders, and therefore ought to be so construed, unless a different sense is *irresistibly* forced upon them by the context."

2 Story's Eq. Jur., § 1069.

"The doctrine of precatory trusts has never met with unanimous approval. Able judges have dissented from it on principle; have pronounced it artificial, and have described it as violating, instead of carrying out the intent of parties. It does seem strange that a testator having a full and settled intention to create a trust, should adopt a mode which at best seems to be a mere suggestion or possible inference, and should not employ the familiar method of creating a trust by express declaration."

2 Pomeroy's Eq. Jur., § 1017.

"The current of decisions has of late years set against the doctrine of converting the devisee or legatee into a trustee."

Lewin on Trusts, (5th ed.,) 110.

"This construing a mere wish or desire into a peremptory command more frequently defeats the intention of the testator than carries it out. It should be presumed that the testator knew the difference between a desire and a command, and used the language with reference thereto."

Tiffany and Bullard on Trusts, 224–5.

In *Sale vs. Moore*, 1 Sim., 534, the Vice Chancellor said, "the first case that construed words of recommendation into a command *made a will for the testator* for every one knows the distinction between them."

In *Meredith* vs. *Heneage*, 1 Sim. 542, Lord Ch. Baron Richards expressed a similar view.

Lord Langdale in *Knight* vs. *Knight* hereafter referred to said "In the construction of wills it is undoubtedly the duty of this Court to give effect to the intention of the testator whenever it can be ascertained, but in cases of this nature and in the examination of the authorities which are to be consulted in relation to them it is unfortunately necessary to make some distinction between the intention of the testator and that which the Court has deemed it to be its duty to perform; for of late years it has been frequently admitted by judges of great eminence that by interfering in such cases the Court has sometimes rather made a will for the testator than executed the testator's will according to his intention."

See also on this subject:

McNab vs. *Whitbread*, 17 Beav., 299.
Reeves vs. *Baker*, 18 Beav., 378 *et seq.*
Fox vs. *Fox*, 27 Beav., 301.
Green vs. *Marsden*, 1 Drewry, 646.
Palmer vs. *Simonds*, 2 *Id.*, 221, 225 *et. seq.*
Webb vs. *Wools*, 2 Sim. N. S., 267-8-9.
Eade vs. *Eade*, 5 Madd., 77.

Without going into a wearisome examination

of the English cases, it is sufficient to say that for more than half a century the English chancellors have spoken of this doctrine, handed down to them by their predecessors, in terms of deprecation and regret, while unable, trammelled as they were by numerous and ancient authorities, to entirely abrogate or repudiate it.

In the United States the doctrine, while it has undoubtedly obtained a foothold, is nearly everywhere viewed with marked disfavor and in some States repudiated.

The most instructive and well considered decision on the subject to be found in the American cases is that of *Pennock's Estate*, 20 *Pa. State*, 268. It traces the origin and history of the doctrine, declared that the rule "rejects the plain common sense of expressions," and that "it has no foundations in any of our customs or institutions and no place in our law."

Vide also

Hopkins vs. *Glunt*, 111 Pa. St., 287.
Burt vs. *Heron*, 66 *Id.*, 400.

In *Howard* vs. *Carusi*, 109 U. S. S. C., 734, the case of *Pennock's Estate* is cited by the Court as authority.

In *Ellis* vs. *Ellis*, 15 Ala., 299, this doctrine was under consideration and the Court having quoted with approval Sec. 1069 Story's Equity, and examined numerous authorities said: "These authorities, with many others which might be cited, show the tendency of modern decisions in

England not to extend this doctrine of implied trust from precatory words, but to go back as far as may be consistent with the current of their previous adjudications to what I humbly conceive to be the true rule of interpretation—that is to give such recommendatory expressions their natural ordinary and familiar sense, and having arrived at the true intention of the testator to let that intention, if lawful, be the rule of decision in the particular case. Thus the Court will execute the will of the testator, and not by a forced technical construction of his words make a will for him * * * * * * In departing from the earlier English authorities we are not wanting in respect for the transcendant learning and abilities of the chancellors who delivered the opinions. We only refuse to follow a rule of construction which many of them acknowledge to have been founded in error and from which they would have gladly have receded if they could. That they, upon this point, have erred, but confirms the declaration in The Book that 'great men are not *always* wise.'"

Vide also.

Lesesne vs. *Witte*, 5 S. C., 459, 461.
Van Duyne vs. *Van Duyne*, 14 N. J., Eq., 400, *et seq.*
Gilbert vs. *Chapin*, 19 Conn., 347.
Harper vs. *Phelps*, 21 *Id.*, 259, 269, 270.
Foose vs. *Whitmore*, 82 N. Y., 405.

Of what value as a standard of private right or public justice, is a rule of law, which must be administered under protest, in the face of a practi-

cally unanimous hostile criticism, and of the continued exercise of judicial acuteness in its evasion. We may say of this doctrine, which has been condemned as contrary to common sense, refined away by hostile criticism, and hedged in by exceptions, what a great Judge said of another rule of law which had been obscured and encumbered by a mass of exceptions: "When we look at the nature of the twenty-four different exceptions to the rule in *Edwards* vs. *Harben*, 2 T. R., 587, which are above enumerated, it is time to ask what does the rule amount to? What is the rule worth?—*and does its preservation deserve a struggle*?"

Note to *Bissell* vs. *Hopkins*, 3 Cow., 189.

While we cannot deny that precatory trusts have been enforced by Courts of Equity, we do considering the *conflict* between the ancient and modern authorities—between those which make wills for testators, and those which endeavored to to *return* to the proper boundaries of judicial power—urge upon this Court that the doctrine is fundamentally wrong and unjust; that it is founded on no living principle of legal or public policy; that instead of effectuating his intention, it, in the language of Lord Eldon, "is generally a surprise on the intention" of the testator, and should not be recognized as existing in any State where it has not already been formally adopted or expressly acquiesced in.

It is not a rule of property in California. Indeed, it is not too much to say that the rule has

no existence in that State at all. It is unsuited to our conditions where the amplest liberty of disposal of property by will exists. Only one case can be found in the Federal Reports touching the subject (*Howard* vs. *Carusi*, 109 U. S. S. C., 725), and there the limitations of the doctrine, rather than its own existence, are considered. That case does not decide that the doctrine of precatory trusts is adopted by the Court. It was unnecessary for the purposes of the case to consider that question. The case was one of an executory devise rendered void by the giving to the first taker of an absolute power of disposition. As to precatory trusts all that can be gathered from the case is that if they are ever recognized it will be with the most stringent limitations. This Court has the right, as well as the power, to repudiate this pernicious doctrine, and we submit that the power and the duty go hand in hand.

And in exercising this power and duty the Court is not without warrant in the legislation of the State of California as well as in general principles. It is frequently said by the text writers that the question does not turn upon the grammatical import of the testator's words. Violence is generally, if not always, done to the ordinary and grammatical sense of the language used by him. But section 1324, C. C., enacts that "the words of a will are to be taken in their ordinary and grammatical sense, unless a clear intention to use them in another sense can be collected and that other can be ascertained."

True this was a general rule of construction of wills long prior to the adoption of the Codes, *but precatory expressions were held not to be governed by it* (*Meggison* vs. *Moore*, 2 Vesey., 633). No such exception or counter rule is to be found in the Code.

That the "ordinary and grammatical sense" of the words "recommend" and "request" is not that of command or peremptory disposition or direction, but implies both the right and power of the party to whom they are addressed to comply therewith or not, as to him may seem proper we need not argue.

We invoke the following sections of the Civil Code of California in aid of our contention.

"Sec. 1319. In interpreting a will subject to the law of this State, the rules prescribed by the following sections of this chapter are to be observed unless an intention to the contrary *clearly appears*."

Among "the following sections of this chapter" are:

"Sec. 1322. A clear and distinct devise or bequest cannot be affected by any reasons assigned therefor, or by any other words *not equally clear and distinct*, or by inference or argument from other parts of the will. * * * "

"Sec. 1324. The words of a will are to be taken in their ordinary and grammatical sense, unless a clear intention to use them in another sense can be collected, and that other can be ascertained."

"Sec. 1331. A devise or bequest of all the testator's real or personal property in express terms or in any other terms denoting his intent to dispose of all his real or personal property, passes all the real or personal property which he was entitled to dispose of by will at the time of his death."

A citation or examination of any great proportion of the numerous authorities on this question has not been attempted in this brief. It would be an useless display of industry, as a few cases illustrative of the doctrine and the general tendency of the Courts answer all legitimate purposes of argument.

It remains to consider whether the terms of the will under discussion bring it within the defined *criteria* of precatory trusts as laid down by text writers and judges of the present day even when recognizing the existence of the rule. What are they?

"Wherever therefore," says Story, "the objects of the supposed recommendatory trusts are not certain or definite; wherever the property to which it is to attach is not certain or definite; wherever a clear discretion to act, or not to act, is given; *wherever the prior dispositions of the property import absolute and uncontrollable ownership;*

in all such cases Courts of Equity will not create a trust from words of this character."

2 Story's Eq. Jur., Sec. 1070.

"As a general rule it has been laid down that when property has been absolutely given to any person and the same person is by the giver, who has power to command, recommended or entreated or wished *to dispose of that property in favor of another*, the recommendation entreaty or wish shall be held to create a trust; First, if the words *are so used* that on the whole they ought to be construed as imperative. Secondly, if the subject of the recommendation or wish be certain; and Thirdly, if the objects or persons intended to have the benefit of the recommendation or wish be also certain."

Knight vs. *Knight*, 3 Beav., 148.

These rules stated affirmatively by Lord Langdale in *Knight* vs. *Knight* and negatively by Judge Story constitute the guides of construction at the present day. The only apparent differences apart from the form of statement are in respect to a branch of the first essential. Lord Langdale says "if the words are so used that *upon the whole* they ought to be construed as imperative." Story says "whenever the prior dispositions of the property import absolute and uncontrollable ownership in all such cases Courts of Equity will not create a trust."

The difference consists in the substitution by Story of the specific for the general rule. The

expressions are complementary and correlative to each other. Words are *not* so used that *upon the whole* they ought to be construed as imperative, when in the same will the prior dispositions of the same property import absolute and uncontrollable ownership.

In *Knight* vs. *Knight*, Lord Langdale said further, "if it appears that the first taker was to have a discretionary power to withdraw any part of the subject from the wish or request * * * it has been held that no trust was created."

Howard vs. *Carusi*, *supra*.

As an aid, if not addition to these rules, it is also said: (1 Jarman on Wills, pp. 395-6.) "In ascertaining whether the precatory words import merely a recommendation, or whether they import a definite imperative direction to him as to his mode of dealing with the property, the Court will be guided by the consideration, *whether the amount he is requested to give is certain or uncertain*, * * * and if there is a total absence of explicit direction as to the *quantum* to be given, * * * * then the Court will infer from the circumstance of the testator having used precatory words expressive only of hope, desire or request, instead of the formal words usual for the creation of a trust, that those words are used *not for the purpose of creating an imperative trust*, but simply as suggestions on the part of the testator for the guidance of the donee in the distribution of the property, the testator placing implicit

reliance on his discretion, and leaving him the sole judge whether he will adopt those suggestions or not, and whether he will dispose of the property in the manner indicated by the testator, or in any other manner at his absolute discretion."

So in *Lesesne* vs. *Witte*, 5 S. C., 461, the Court said: "The vagueness in the direction as to the proportions which the supposed beneficiaries shall enjoy, where the benefit may be claimed by more than one, and the want of description of the manner in which the trust is to be executed may well be urged against its existence. As observed by Mr. Lewin in his treatise on trustees, 169, (*? 106*) 'the difficulty that would attend the execution of such imperfect trusts, is converted by the Court into an argument that no trust was really intended.'"

Applying these tests which are sustained by all the modern authorities to the will under consideration, what is the result.

It may be admitted that the objects, *i. e.*, the beneficiaries, of the recommendation are certain, but this is the only requisite complied with:

(*A.*) The property to which the trust is to attach is not certain or definite.

The will declares that all the estate of which the testator died seized or possessed was community property, having been acquired since his marriage with the defendant. He had then the

power of testamentary disposition of one-half only, the other half was the respondent's absolutely. The testator has selected or designated, no particular property or fund which shall be charged with the supposed trust. Is it personal or real property that is charged with it? If defendant should sell some part of the property devised to her, would the trust follow it into the hands of the purchaser? To what extent would it be so charged? Would a proportionate part of the "gift and provision" be calculated and apply to such property in the hands of the purchaser?

(*B.*) The amount to be given to both or either of the alleged beneficiaries is uncertain. There is a total absence of explicit direction as to the *quantum* to be given; not even a maximum or minimum fixed. For these reasons, as well as on account of the language used, viz: "and request her to make such *gift* and provision for them as in her judgment will be best," it is clear that the entire matter is left to her discretion.

Suppose this Court were persuaded that it should interfere and substitute its judgment for that of the respondent, as to the "gift and provision" to be made for complainants, what method of enquiry, what course of investigation, or basis of calculation will the Court adopt to determine the *quantum* of that gift or provision? Will it follow the theory of the bills and direct a separate "gift and provision" for each of the complainants or make "such gift and provision" for them jointly? Will it adopt the rule of stated

payments in the nature of an annuity, or direct the payment of a lump sum in immediate satisfaction of their equity? In either event what would be the basis of calculation, the supposed affluence of the respondent, or the alleged poverty of the complainants. If the complainants were shown, in the language applied by their eloquent counsel, on the oral argument in the Court below to the respondent, to be possessors of "vast wealth" which enabled them to "roll in luxury," and it were found that the only purpose subserved by adding to their store would be that "splendor might gild *their* days," would that destroy their equitable estate in the property of the testator or nullify the supposed trust in their favor? If the "gift and provision" should be ordered to be made in the shape of an annuity, would it be fixed now for all future time, or remain in the control of the Court to vary with the future affluence or necessities of the complainants? In amount it would be made sufficient to supply them with luxuries, or confined to the requirements of simple subsistence? Would the fact that if the testator had died intestate the complainants would have been entitled to no part whatever of his estate be an ingredient in the consideration of their claim?

If the alleged affluence of the respondent is to be the basis of calculation will the Court consider other obligations and ties of kindred as binding on and sacred to the defendant as those of filial and fraternal duty on the deceased? Will any deduction or reservation be made from the capital on which the claims of the complainants are to be

assessed or calculated by reason of the *at least* equally strong claims of the two daughters of the respondent and the testator, or of those of her own mother and sister?

Applying the rule laid down in *Lesesne* vs. *Witte*, *supra*, must not "the difficulty that would attend the execution of such imperfect trusts *be* converted by the Court into an argument that no trust was really intended?" Is it not true that "the want of description of the manner in which the trust is to be executed may well be urged against its existence"?

(*C.*) The absolute devise to the defendant, accompanied as it is with a power of sale of their entire estate, is inconsistent with, and will overcome any suggestion that the recommendatory clause of the will is imperative. It is evident that the testator intended to invest his wife, absolutely with all his estate. He has seen fit to devise the whole to her absolutely, setting aside in her favor, though not forgetting the claims of their children, who, had he died intestate, would have succeeded to two-sixths of the estate. He commends them to her consideration; but it is evident from the language and the spirit of the entire instrument that the making of a GIFT or a provision of any kind for children, mother, or sister, was left to the full and free discretion of the respondent.

That the disposition of the entire estate of the decedent to defendant was absolute and unconditional is demonstrated by the fact that even pend-